87-2083

No.

In the Supreme Court

OF THE

United States

October Term, 1987

The Mozart Company, a corporation,

Petitioner,

vs.

Mercedes-Benz of North America, Inc., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

By "defense of business justification" in questions 1, 2 and 3 below is meant a defense that some interest of the tying party legalizes what would otherwise be an antitrust violation which the jury found was an unreasonable restraint under the Rule of Reason.

1. Is any defense of "business justification" countenanced at all to a claim of a tying violation of Section 3 of the Clayton Act?

2. Is any defense of "business justification" countenanced to a claim of tying violation of Section 1 of the Sherman Act—unless possibly that the tying vendor cannot state specifications of the tied product? In this case it was conceded that it could and did.

3. With respect to a claim of violation of Section 2 of the Sherman Act by an attempt to monopolize

   (a) Is any defense of "business justification" countenanced at all?

   (b) Is inference from predatory conduct the only way to show "specific intent"? Is there any reason why specific intent cannot be shown by direct evidence of the intent?

4. Where all the elements necessary to collateral estoppel (issue preclusion) are established, can the preclusion be defeated by claiming that more or different evidence is available at the later trial?

5. Are not tying arrangements still of antitrust concern, and is not the "leverage theory" of tying as stated in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9 Cir. 1984), to which this Court denied certiorari, 473 U.S. 908, still valid law, particularly when the fact-finders have found unreasonableness under the Rule of Reason and not merely a *per se* violation?

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Petitioner The Mozart Company[1] prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in *The Mozart Company v. Mercedes-Benz of North America, Inc.*, Nos. 86-1733 and 86-2156 in that court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 833 F.2d 1342 (1987) and is set out as Appendix A (p. A-1 below). An opinion of the district court at an earlier stage appears in 593 F.Supp. 1506 (N.D.Cal. 1984) and is set out in Appendix B (p. A-20).

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment was made and entered on December 9, 1987. A timely petition for rehearing was filed on December 21, 1987, and was denied on February 26, 1988 (Appendix C, p. A-50). Time to file this petition for certiorari was extended through June 27, 1988, by order of Justice O'Connor on April 28, 1988 (Appendix D, p. A-51).

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291; the district court had jurisdiction under 15 U.S.C. § 15 and 28 U.S.C. § 1337(a)

STATUTES INVOLVED

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, as amended, Sections 3 and 4, 15 U.S.C. §§ 14 and 15, and Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, Sections 1 and 2, as amended, 15 U.S.C. §§ 1 and 2.

The text of the statutes is set forth in Appendix F, at A-54.

Emphasis in all quotations in this petition has been added unless otherwise noted.

[1]All of Petitioner's stock stands in the name of Cayhaven Corporate Services, Limited, Grant J.R. Stein and David G. Bird as nominees of Mozart Development Company, of which John Mozart is the sole stockholder.

STATEMENT OF THE CASE

In 1941 the Federal Trade Commission issued a cease and desist order, holding unlawful under Section 3 of the Clayton Act a requirement in automobile dealer agreements compelling the dealer to buy its replacement parts from the manufacturer of the automobile. *In the matter of General Motors Corporation, and General Motors Sales Corporation*, 34 F.T.C. 58 (1941). That requirement had theretofore been commonly imposed by American automobile manufacturers on their dealers. American manufacturers thereupon discontinued the practice, and a healthy competition in replacement parts from independent distributors then arose.

In 1965 respondent, Mercedes-Benz of North America (hereafter "MBNA"), began distribution in the United States of the famous Mercedes-Benz automobile, manufactured in Germany by its parent, Daimler-Benz A.G. ("DBAG"). MBNA set up a system of over 400 automobile dealers. The sole means by which one may buy Mercedes cars for resale is by becoming a party to a standard written "Dealer Agreement" with MBNA. That agreement imposed on the dealers a tying clause in the most stringent form requiring purchase of replacement parts from MBNA and prohibiting purchase from anyone else. MBNA first considered adopting the *less restrictive alternative* of allowing purchase of parts from others if equivalent in quality and design to parts obtainable from MBNA or expressly approved by it or DBAG. But it rejected that provision in favor of the absolute requirement, and it set up no procedures by which anyone could seek or obtain approval of parts supplied by others. By 1979 MBNA was selling over $93 million of replacement parts in this country. Despite the fact that it charged 40% to 60% more than independent dealers for the same parts, its dealers purchased from it, as the Dealer Agreement required. Thereby they either suffered loss of profit or else foisted the higher prices onto the consumer.[2]

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[2] The opinion below refers to MBNA's Dealer Agreement as a "franchise", although not so labeled, but this case does not concern the kind of "franchising" that has grown up of recent years, nor does it involve questions about "packaged" sales. What this case involves is the

In 1971 John Mozart established Eurasian Automotive Products, Inc., an independent business of distributing replacement parts for foreign automobiles. Eurasian came to be recognized as the second largest, fastest growing, and most successful of the independent distributors of replacement parts for imported automobiles in the United States. Except for sales of parts to Mercedes dealers, its annual sales increased by nearly $20 million. Phenomenally successful in the other aspects of its business, its sales to Mercedes dealers remained low and flat.

In 1981, following suit by the United States against the same defendant in 1979, petitioner, as Eurasian's assignee, filed this antitrust suit in the district court in San Francisco, claiming violation by respondent of Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The time period involved is 1975-1979. (For convenience, petitioner and Eurasian are hereafter referred to as Mozart.)

In 1984 this Court decided *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984) (hereafter "Hyde"). The Court had repeatedly condemned tying arrangements as serving "hardly any purpose beyond the suppression of competition", e.g., *Standard Oil Co. v. United States,* 337 U.S. 293, 305 (1949); *Northern P.R. Co. v. United States,* 356 U.S. 1, 6 (1958), stating that they "fare harshly under the laws forbidding restraints of trade", *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 606 (1953). That condemnation of tying arrangements came to be assailed by a group of economists and legal academicians (often called the "Chicago School of Antitrust"[3]), which contended that tying should not be deemed an antitrust violation at all. A leading example is Professor (later Judge) Robert Bork, *The Antitrust Paradox,* Ch. 19 (Basic Books, Inc., 1978). In *Hyde* this Court rejected the assault, made clear that tying arrangements are still a matter of antitrust concern, and reaffirmed and clarified its law about when a tying arrangement is illegal *per se.*

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straight forward old-fashioned situation where the purchase of a desired product is conditioned on purchase of another.

[3] It is so denominated in H.R. Rep. No. 421, 100th Cong., 1st Sess., at 11 (1987), a report on H.R. 585.

It also called attention to the fact *that, even when not illegal per se, a tie may be unlawful under Sherman Act, § 1, under the Rule of Reason.*

Also in 1984, the Ninth Circuit in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, held that it is not necessary to a tying violation for the vendor to have a monopoly or even a dominant position throughout the market of the kind of product in which the tying product falls, and that it is sufficient that some buyers find the seller's product so uniquely attractive that they succumb to a tie. It held that a tying arrangement is illegal *per se* if the seller of the tying product has the capacity to force some buyers to purchase a tied product they do not want or would have preferred to purchase elsewhere; all that is required is *leverage*, "some special ability" to force a purchaser to do something that he would not do in a competitive market. This, it held, could be found in possession of anything that makes the tying product sufficiently unique, and the economic power to compel a tie may have its source in a distinctive trademark when the tying product is "available only from defendant" and is "sufficiently attractive to some customers to enable defendant to require those who wished to obtain it also to buy [another product] from defendant" (e.g. p. 1345, 1346).

Data General petitioned this Court for certiorari, and this Court allowed MBNA, the present respondent, to file an *amicus* brief in support of the petition. *Data General Corporation, petitioner v. Digidyne Corporation, et al.*, 469 U.S. 1155. MBNA's *amicus* brief then stressed that a reversal of *Digidyne* was important to *its defense of the present case.*

In 1985 this Court denied certiorari in *Digidyne*, 473 U.S. 908. Also in 1985 this case went to trial. The bulk of the evidence in an *eleven* week trial was on the issue whether MBNA had "economic power". The case was put to the jury on the law as stated in *Hyde* and in *Digidyne.*

The jury was instructed to return a *special* verdict on whether the tie was an unreasonable restraint of trade *per se*, and it answered that it was.

It was *also* instructed to return a special verdict on whether the tie was an illegal restraint under the *Rule of Reason*, i.e., did it

restrain trade and was it anticompetitive? To use the phrasing of *Business Electronics Corp. v. Sharp Electronics Corp.*, ____ U.S. ____, 99 L.Ed.2d 808, 108 S.Ct. 1515 (May 2, 1988), the "factfinder [was to weigh] all of the circumstances of a case in deciding whether a restrictive practice . . . imposed an unreasonable restraint on competition". Or to use the words of *Hyde, supra* (466 U.S. at 29), "after inquiry into the actual effect" on competition, the jury was to determine whether the arrangement did unreasonably restrain it. *The jury answered "yes"* to that question; the tie *did* restrain trade, and it *was* unreasonable, not only *per se* but *also* on weighing the evidence *under Rule of Reason.*[4] This verdict followed after all parties had introduced evidence on relevant market, competitive effects, and all else that enters into reasonableness.

One would have supposed that with these two special verdicts the case would proceed to a jury determination of fact and amount of damages. *Instead, the trial court directed verdicts for MBNA on the Clayton, § 3, claim and the Sherman, § 2 claim.* Mozart moved for judgment, notwithstanding the verdict, of liability on the tying claim in accordance with a prior motion for a directed verdict made at the close of evidence. This was denied, and the Court entered judgment for MBNA on all the claims. It did so because of a third special verdict, requested by the court in the event either of the first two special verdicts found violations. To the question "Do you find that there was a business justification for the conduct which you have found violated Section 1?" the jury answered "yes". Justification was claimed by MBNA as protection of its good will.

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[4] The special verdicts read:

"1. Do you find that the defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the *per se* test?

"Yes."

"2. Do you find that defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the Rule of Reason test?

"Yes."

Appendix E hereto, A-52, is a copy of the special verdicts.

By appropriate motions and objections Mozart submitted that (1) there can *never* be a business justification to a Clayton Act, § 3, case, (2) that there can *never* be a business justification to an attempt-to-monopolize violation of Sherman Act, § 2, and (3) that as respects a tying violation under Sherman Act, § 1, the *only* justification, *if any*, countenanced by law would be that the maker of the tying product could not reasonably state specifications of the tied product sufficient to permit others to manufacture it, and it was conceded that specification was possible and was done.

On the appeal MBNA no longer contended, as it had in the trial court, that it lacked the "economic power" necessary to make the tie unlawful. It did *not* contend that the instructions on that issue were improper. It rested its case purely on "business justification". It did not contend that, absent justification, it had not violated the law. The issue of economic power was argued neither in the briefs nor orally.

Nevertheless, in affirming the judgment, the court below disagreed with the Ninth Circuit's prior decision in *Digidyne*. In essence it rejected the view that tying is an antitrust offense, and it held that the trial court's instructions, based on *Digidyne* which this Court had left undisturbed, were "flawed". It repudiated the "leverage theory" outright (A-6, fn. 3).

The Metrix Case

Before this action was filed, an identical action against MBNA, claiming a tie unlawful under Sherman Act, § 1, had been commenced by Metrix Warehouse, Inc., another independent distributor of replacement parts, in the United States District Court for the District of Maryland, *Metrix Warehouse, Inc. v. Daimler-Benz and Mercedes-Benz of North America, Ltd., et al.* The issue was the same as here, the lawfulness of MBNA's compulsion that its automobile dealers buy replacement parts from MBNA, and MBNA there advanced the same claim of "business justification". The *Metrix* case was tried first, and the jury in *Metrix rejected the claim of "business justification"* and returned a verdict for Metrix. The district judge in that case upheld that verdict of illegality on motion but granted a new trial on the amount of damages. Upon the basis of the *Metrix* decision, Mozart moved that liability and, particularly, the issue of justifi-

cation were settled by collateral estoppel or issue preclusion under the principles laid down in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The district court here denied the motion on the reasoning that the *Metrix* decision lacked finality. But, while the present case was being subsequently tried, the district court in Maryland certified *Metrix* for an interlocutory appeal under 28 U.S.C. § 1292(b), and, while the present case was under submission in the Ninth Circuit, the Fourth Circuit affirmed, *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft and Mercedes-Benz of North America*, 828 F.2d 1033 (1987).

The Ninth Circuit then held that the Maryland decision *was final* for purposes of collateral estoppel (A-10), but it nevertheless refused to apply collateral estoppel on the basis that the evidence in the two cases was different (A-11).

MBNA then petitioned this Court for certiorari to the Fourth Circuit in the *Metrix* case. On May 16, 1988, this Court denied the petition. (*Mercedes-Benz of North America v. Metrix Warehouse, Inc.*, No. 87-1560, ____ U.S. ____, 56 U.S.L.W. 3790.

Thus, what is an unlawful tie in the Fourth Circuit is a lawful tie in the Ninth Circuit with respect to the same vendor, the same product, the same tie, and the same justification.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the governing decisions of this Court in the antitrust field (identified below in context), creates non-legislative exceptions to specific enactments of Congress, essentially eliminates tying arrangements from antitrust condemnation entirely, creates conflicts in several areas between the Ninth Circuit and the Fourth, Sixth and Eighth Circuits, and is based on recent views of the Antitrust Division of the Department of Justice that Congress then explicitly denounced.

It also imperils the existence of an entire industry, the independent distribution of replacement parts for automobiles. Under the reasoning of the decision, it is now lawful for American car manufacturers to return to the practices outlawed over 40 years ago.

In the area of issue preclusion, the decision is not only a long back step from *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313 (1971) and *Parklane Hosiery Co. v. Shore, supra*, 439 U.S. 322 (1979); it is a contradiction of the elementary basis of the law of issue preclusion.

In *Digidyne* this Court declined to review a holding in tying law that MBNA asked this Court to reverse as injurious to its defense in the present case. In *Metrix* this Court declined to review the Fourth Circuit's decision that the tying provision in MBNA's dealer agreement was unlawful, and that it was not saved by any business justification. We now ask the Court to review the decision below, which holds to the contrary of *Digidyne* and also contrary to *Metrix* relative to the same vendor, the same product, the same tie, and the same justification. When this Court denied certiorari in *Digidyne*, Justices White and Blackmun dissented from the denial because they believed that substantial issues of tying law were present which called for resolution. That view would seem certainly timely now. Similarly, one would think that MBNA, having urged that certiorari was warranted at the time of *Digidyne*, cannot consistently dispute that it is warranted now.

The Antitrust Division of the Department of Justice had sued MBNA under Sherman § 1, claiming a tying violation by the same provision of the Dealer Agreement involved in the present case and in the same court. After the court denied cross-motions for summary judgment, *United States v. Mercedes-Benz of North America*, 517 F.Supp. 1369 (N.D.Cal. 1981), the Antitrust Division dismissed all its tying cases throughout the country, thus abandoning enforcement of the law to private plaintiffs. The district court accepted the dismissal of the *Mercedes-Benz* case with reluctance, as beyond its power to reject (*United States v. Mercedes-Benz of North America*, 547 F.Supp. 399 (1982)).

What animated the Antitrust Division was a negative attitude about tying law, and in 1985 the Division summed up its views on the subject in its so-called "Vertical Restraint Guidelines". In its petition for certiorari in the *Metrix* case, MBNA relied on these guidelines and submitted to this Court that they reflect "contemporaneous antitrust jurisprudence". Congress reacted strongly. By a joint resolution in 1985 it denounced the "policy guidelines",

including those relative to "legality of tying arrangements" as "not an accurate expression of the Federal antitrust laws or of congressional intent".[5] Congress therein urged that these guidelines "not be accorded any force of law or be treated by the courts of the United States as binding or persuasive" and denounced them as "inconsistent with established antitrust law as reflected in Supreme Court decisions. . . . " In 1987 the House returned to its criticism of these administrative limitations on concepts of antitrust violation in enacting H.R. 585, referred to in fn. 3, at p.3, above.

We turn to demonstrate each of the foregoing reasons sufficiently, we submit, to warrant this Court's review.

I

On The Question Whether There Can Be A Defense Of "Business Justification" To An Otherwise Unlawful Tie

This case was decided for MBNA in the trial court *solely* on the defense of a "business justification". Affirming, the court below states (A-11, 12) that the "heart of this case [is] whether the tying arrangement was justified by business necessity". It proceeded, "[w]e have recognized that antitrust defendants may demonstrate a business justification for an otherwise *per se* illegal tying arrangement". It did not address the fact that the tie had also been held unlawful under the Rule of Reason.

On this subject of justification, there is a direct conflict between the Fourth Circuit and the decision of the Ninth. In its petition for certiorari in the *Metrix* case, which this Court denied last May, MBNA told the Court (at p. 9) that the Fourth Circuit had held that "MBNA had no valid business justification" and (at p. 15):

> "The practical dilemma faced by MBNA appears from comparing the Fourth Circuit's decision in the present case—which summarily rejected MBNA's business justifica-

[5] The joint resolution was contained in the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act. (Act of Dec. 13, 1985, Pub. L. No. 180, Sect. 605, 1985 U.S. Code Cong & Ad. News (99 Stat.) 1169, 1170.)

tion defense—with the Ninth Circuit's subsequent decision in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987)—which accepted the defense."

Tying law was created in 1914 by Section 3 of the Clayton Act. When Section 1 of the Sherman Act later entered into the area of tying law it did so only because Clayton Act, § 3, does not apply unless both tied and tying products are commodities; if ties of services, intangibles or real property were to be reached, it became necessary to resort to Section 1 of the Sherman Act. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9 Cir. 1977).

As the present case involves goods and commodities, it falls under Clayton Act, § 3. In Part B below we consider the subject of "business justification" in a Sherman, Sec. 1, tie. We now submit that no "business justification" can exist to a Clayton Act, § 3, case.

A. Congress Allowed No "Business Justification" To A Tie Under Clayton Act, § 3, And Courts Cannot Create One

L. Sullivan, *Antitrust* (West, 1977) states (§ 151, p. 432; § 152, p. 440), that Congress' reason for enacting Section 3 of the Clayton Act in 1914 was its adverse reaction to the Rule of Reason this Court found in the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and that Congress' purpose was to outlaw conduct not then thought to be prohibited by the Sherman Act. The special significance of Clayton Act, § 3, Professor Sullivan states, was that it suggested a more rigorous legal norm, a lower threshold of allowability, than the Sherman Act.[6]

When Section 1 of the Sherman Act was imported into tying law in order to reach ties of services, intangibles, or realty that Clayton Act, § 3, does not reach, arguably it would not balk the command of Congress about ties to allow a "business justification" to restraints that would fall outside any law and go unpunished if Clayton Act, § 3 were the only applicable law. But

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[6] Professor Sullivan is favorably referred to (at p. 12) in H.R. Rep. No. 421. (See fn. 3, *supra*.)

whatever may be permissible in a Section 1 case—and we comment on that subject in Part B below—there is no room to permit any defense of business justification to a charge of violating Section 3 of the Clayton Act.

The prohibition of Clayton Act § 3 is declared legislatively, not judicially. It is direct, express, and specific. The statute, quoted in Appendix F, A-54, prescribes its own tests. Given the element of "commerce", all that is necessary to illegalize a sale on the condition, agreement or understanding that the purchaser shall not use or deal in commodities of a competitor of the seller is that the effect "may be to substantially lessen competition or tend to create a monopoly". *And that element was established in the present case by the special verdicts.* The Clayton Act says nothing about "reasonableness", that element has never been read into it, and only Congress can do so. As stated in H.R. Report No. 421, 100th Congress, 1st Sess. (1987)[7] "Congress has historically demonstrated an unequivocal role as the 'ultimate anti-trust policy maker' ". This Court acknowledged that it is not for the Courts "to indulge in the business of policy making in the field of antitrust legislation" (*Jefferson Cty. Pharm. Assn v. Abbott Labs*, 460 U.S. 150, 170 (1983).

The Court spoke directly to the point in *International B. Mach. Corp. v. United States*, 298 U.S. 131, 140, a Clayton § 3 case, decided in 1936 before resort to Sherman § 1 for tying occurred:

> "The Clayton Act names no exception to its prohibition of monopolistic tying clauses".

The decision below is in direct conflict with that decision. It is in conflict with the Third Circuit's decision in *Radio Corporation v. Lord*, 28 F.2d 257 (3 Cir.), *cert. denied*, 278 U.S. 648 (1928):

> "The defendant says that, for the sake of uniformity, efficiency, and durability, it is desirable to have these particular tubes, made by it, placed in these licensed sets or circuits to make them initially operative. This may or may not be true, but, if true, it makes no difference, for excellence

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[7] A report on H.R. 585, a bipartisan bill introduced in the House by Hon. Peter W. Rodino (D) and Hon. Henry J. Hyde (R).

of product does not justify the evasion or violation of the provisions of the Clayton Act."

The decision below ignores the basic teachings so often announced by this Court[8] that:

> "The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

This Court has never recognized a business justification defense in a Clayton Act, § 3, case. Until now, no other court has done so. The decisions cited in the opinion below (at p. A-12) are not Clayton Act cases.[9]

The manner in which the court below held "justification" to be applicable in a Section 3 case was to posit applicability in a Sherman Section 1 case, and then, in a passing sentence, to say that it had treated the tests of a Section 3 violation and a Section 1 violation as "virtually the same" (A-18). That was a cavalier comment, for the cases then cited refer to another matter entirely. In *Times-Picayune Pub. Co. v. United States, supra*, 345 U.S. 594 (1953), a Sherman § 1 case, this Court held that in a Sherman § 1 case more was required to establish the necessary lessening of competition than in a Clayton, Sec. 3 case. It is this difference that late Ninth Circuit cases had suggested had "eroded", and in this respect only had the court treated the tests of a Section 3

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[8] As in *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *Associated Press v. United States*, 326 U.S. 1, 16, fn. 15 (1945); *Radovich v. National Football League*, 352 U.S. 445, 453, fn. 10 (1957).

[9] *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716 (9 Cir. 1981) involved a tie of telephone services. In *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9 Cir. 1977) the tying item was cemetery plots, not a commodity but realty. In *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203 (9 Cir. 1982), there was no claim of violation of Section 3 of the Clayton Act; the claim was violation of Sherman Act, § 1 (so stated p. 1207). This is so of *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476 (9 Cir. 1983); so stated at p. 1477. There the tied product was of "bookkeeping services" (p. 1477).

violation and a Section 1 violation as the same. The consequence was that the easier test for establishing liability under Section 3 had been carried into Section 1 cases. The effect was to increase liability in a Section 1 case, not to decrease it in a Section 3 case. *In none of these cases was there the remotest suggestion that judicial decision had increased the requirements of a Clayton § 3 violation by inserting into the Clayton statutory tests any defense which Congress had not seen fit to state in the statute itself.*

B. If Business Justifications Can Ever Be Recognized As A Defense To A Sherman Act, § 1, Tying Claim, It Can Only Be Where Specification Is Not Possible. Here It Was Conceded That It Was Both Possible And It Was Done

Until the present decision there had been some *dictum* that there could be a "business justification" defense, albeit an extremely limited one, to a Sherman Act, § 1, tying violation, but in no case had the defense been sustained.[10] The decision below is the first actually to do so. But even taking the *dictum* to be law, there are two essentials: (1) there must be no less restrictive alternative, and (2) as stated by this Court in *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949):

> "[T]he protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. . . . The *only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.*"

The opinion below concedes: "*Mozart* is right, of course, when it insists that MBNA could have furnished design specifications

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[10] *In re Data General Corp. Antitrust Litigation*, 490 F.Supp. 1089, 1101 (N.D.Cal. 1980) observes, "[a]lthough both the Supreme Court and the Ninth Circuit have noted in *dicta* that business justifications may 'save' a tie-in, [citations omitted] neither court has held that any particular tie-in would have violated the antitrust laws but for legitimate business justifications".

for Mercedes replacement parts" (at A-16, 17). MBNA and its parent, Daimler-Benz, not only could, they did. They furnished the specifications for fast moving parts, those involved in this case, to Original Equipment Manufacturers (OEMs) both in Germany and the United States. MBNA confessed that it could not satisfy the requirement of impossibility of specifications. In its brief in the Fourth Circuit in the *Metrix* case it said (p. 31) that, "uncontroverted evidence was that DBAG in fact provides specifications for 50% of its parts, and that those parts in fact are produced by others—its OEM suppliers". In its petition to this Court for certiorari in the *Metrix* case, MBNA also conceded the fact.

The parts supplied by independent distributors were identical with those coming through MBNA. As one of MBNA dealer witnesses said, "We know these are identical parts furnished by the same factories and suppliers with one important difference. The independents are much lower in price" (Tr. 32-85). There were repeated complaints to MBNA by dealers about "customer resistance to the higher cost of maintaining the car" due to MBNA's prices for parts. MBNA bought 20% of its parts from OEMs in the United States, and independent distributors had access to the OEMs' entire line of parts. The other 80% came to MBNA from its parent DBAG, which bought half from German OEMs who sold the same items to American independent distributors. All these OEMs were furnished by DBAG with its specifications.[11]

The opinion below simply does not square with this Court's law as stated in *Standard Oil, supra.* It replaces this Court's law with another view, for it recognizes and allows a "business justification" where specification is both possible and done. It said (A-13, 14), the "fact that quality specifications is possible does not mean, therefore, that the tie-in is not necessary to assure high quality products". This not only contradicts this Court, its reasoning is directly contrary to what the Fourth Circuit held in the *Metrix* case, and with the conclusion reached by another careful

[11] Most of the other half, which DBAG manufactured, were the slow moving parts like engines and transmissions, which the independents did not handle.

contemporaneous study, that of the Monopolies and Mergers Commission of the United Kingdom.

In 1982 that Commission presented to Parliament in pursuance of Section 17 of the Competition Act of 1980 "A Report on the matter of the existence or the possible existence of a complex monopoly situation in relation to the wholesale supply of motor car parts in the United Kingdom" (London, Her Majesty's Stationery Office, HC318). The Commission reported that numerous motor car manufacturers, including the manufacturer of Mercedes-Benz automobile, had imposed on their dealers a requirement that the dealer purchase all replacement parts from the automobile vendor, and it quoted from the dealer agreement of Mercedes-Benz (United Kingdom) Limited, the counterpart in the United Kingdom of MBNA in the United States (Report, Appendix B, p. 58). The Report described the justification advanced by the car manufacturers and importers thus (pp. 46, 47):

> "[I]t would be damaging to their reputation and therefore against their commercial interests if inferior, unsuitable or unsafe parts were put into their cars since any subsequent failure which might result would tend to be associated with the car itself rather than attributed to the parts concerned. Insistence on exclusive buying of parts by their franchised dealers enabled car manufactures and importers to ensure the provision of appropriate parts, which together with the provision of adequate and competent service was part of the package they must offer if they were to compete successfully in the sale of cars."

This, of course, is the "justification" offered by MBNA and accepted by the court below. The Committee rejected the justification as unsound. It said (p. 47):

> " . . . it is not necessary for a manufacturer or importer to insist that his franchisees obtain spare parts exclusively from him.
>
> * * * *
>
> "The question which we are considering at this point is whether exclusivity benefits the public, not whether it suits

the interest of car manufacturers and importers. Our view is that the public interest is protected because franchisees have their own interest in ensuring that they do not supply their customers with inferior parts. For franchisors to attempt by insisting on exclusive buying to ensure that all parts stocked are of a standard approved also by them does not, in our judgment, confer on the public any additional benefit commensurate with the adverse effects set out in paragraphs 6.19 to 6.34."

The adverse effects so set out were that distributors of parts were excluded from the market (¶ 6.19), the provision constituted a "limitation of the extent to which component manufacturers can compete with one another and with car manufacturers and importers", effects a "restriction of price competition", places a "limitation on the level of service from which the franchised sector of the market can benefit" and constitutes "restriction of competition among factors" (¶ 6.34, p. 46).[12]

The reasoning of the court below in disregarding the law stated in *Standard Oil v. U.S.* is that there is no guarantee that other suppliers will adhere to the specifications. If that were justification for imposing a tying restraint, every manufacturer could impose one on its dealers, with impunity, and *Standard Oil* would be a dead letter. Both the Fourth Circuit and the United Kingdom Commission rejected that kind of reasoning, both held that the operations of a *free market* would adequately assure that

[12] The Report noted that the Dealer Agreement required the dealers to carry a sufficient stock of parts acquired from Mercedes-Benz to supply those who wished parts coming from Mercedes-Benz. It found nothing wrong about that provision, and Mozart has not assailed a similar provision in MBNA's Dealer Agreement. But the Commission found no justification for the further absolute requirement. MBNA's agreement also provided that the dealer not represent to a customer that a part not obtained from MBNA had been. Mozart did not criticize that requirement. What it prohibited would be a common-law fraud; indeed, a California statute enacted in 1975, and several statutes of other states, contained identical prohibition (Cal. Vehicle Code, § 12001). The vice of the Dealer Agreement is that it went far beyond these legitimate prohibitions.

products not coming through the automobile vendor would be of equal quality with those coming from it, if specification were available, for the dealers "have their own interest in insuring that they do not supply their customers with inferior parts". Thereby the English Commission followed the uniquely American antitrust concept that the *free market*, not artificial restraints, best protects competition. The Fourth Circuit observed that "MBNA's judgment of its dealers and consumer" ran contrary to the Sherman Act's policy that competition rules the marts of trade.

The issue about "business justification" is not one of bare fact peculiar to a particular case, such as whether a person ran a stoplight. It goes to a legal standard. *The law has laid down a strict standard, important to the enforcement of antitrust policy.* Ever since the Federal Trade Commission decision in *The Matter of General Motors Corporation, et al, supra*, 34 F.T.C 58 (1941), American manufacturers of automobiles have not used a tying clause like that here. With the blessing of the court below, they will now do so. The decision spells the end of an *entire industry* in the United States, that of independent suppliers of replacement parts to automobile dealers.[13]

Less Restrictive Alternative

As noted above, dictum giving any recognition to a "business justification" conditions it upon absence of a less restrictive alternative, and the Fourth Circuit in *Metrix* held that one of the reasons the justification defense failed was that there were such alternatives. MBNA's petition for certiorari in the *Metrix* case told this Court (p. 10) that the Fourth Circuit held that MBNA need only to require

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[13] The opinion below suggests in a footnote (A-14) that Mozart did not challenge the instructions on justification. The fact that the court's comment is in a footnote indicates that it did not mean to suggest that Mozart had waived its contention. Plainly it did not. Mozart had presented all its objections about justification, first by motion for summary judgment, then by requests for an instruction directing a verdict, then by request for further instructions after the evidence was in, and then by motion for directed verdict before anything was given to the jury.

> "its dealers to tell customers that the parts used in repair work were not genuine; it could prevent free-riding on warranties by stamping MBNA's parts with identifying numbers; and it could assure quality control and maintain goodwill through specification of standards to suppliers."

These are much the same as the statements of the Monopolies and Mergers Commission of the United Kingdom. And, as noted above (p. 2), when MBNA first adopted its Dealer Agreement it considered but rejected a less restrictive alternative.

II

"Business Justification" Is No Defense To A Claim Of Violation Of Sherman Act, § 2, By An Attempt To Monopolize

Petitioner asserted not only a claim of unlawful tying but also a claim of an attempt to monopolize in violation of Section 2 of the Sherman Act. The decision of the court below on this issue conflicts with decisions of the *Eighth and Sixth Circuits.*

Facts entering into a tying arrangement may also enter into an attempt to monopolize, but the elements of the two are not identical. Under a given set of facts, there may be one or the other or neither or both. The elements of the offense of an attempt to monopolize are two: (1) a specific intent to monopolize and (2) some anticompetitive act or acts done in furtherance of that intent.[14]

The trial court declined to let the jury pass on the claim. Its reasoning was that, if the jury awarded damages on the Sherman

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[14] Concerning a third element of "dangerous probability of success", Ninth Circuit law is notoriously obscure and so recognized by that court, (*Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925, 926 (9 Cir. 1980), *cert. denied*, 450 U.S. 921 (1981)). But that element is not material in this case, for *to* "monopolize" does not mean acquisition of 100% of the relevant market. *United States v. Grinnel Corp.*, 384 U.S. 563, 570-71 (1966). Even under the most extreme calculations of its counsel, MBNA had at least 70% of the market. Affirmance of the judgment will make it a certainty that MBNA will enforce its tying clause so as to have 100% of the Mercedes dealer market for replacement parts.

Act, § 1, tying claim, there would be no need for the Section 2 claim, and, if the jury should find neither *per se* nor Rule of Reason violation of tying law, the anticompetitive element necessary to an attempt to monopolize would be absent. But the events show that these were not the alternatives. The verdicts landed in between; they *found unreasonable anticompetitive conduct that did restrain trade.* Accordingly, Mozart moved for a directed verdict of liability on Sherman § 2 claim with instruction to the jury to determine impact and damages. Alternatively, it moved that the entire claim of attempt to monopolize be given to the jury on appropriate instructions including an instruction that "business justification" is not a defense to a violation of § 2 by an attempt to monopolize.

Anticompetitive conduct having been found, the only remaining question could be presence of "specific intent". The court below affirmed on the reasoning that failure to prove a substantive tying claim was the death knell of a § 2 claim, on the basis that "specific intent" can only be shown by "proof of unfair or predatory conduct" (at p. A-18). On this premise, having stripped MBNA's conduct of being "unfair or predatory" by virtue of "business justification", it eliminated "specific intent".

But it cannot be the law that "specific intent" can only be shown *circumstantially* by proof of unfair or predatory conduct. Intent is a state of mind. Because leeway must be given to prove state of mind, the law indulges a plaintiff to establish the necessay state of mind by inference from unfair or predatory conduct. But that indulgence in allowing a plaintiff to prove specific intent by inference cannot mean that a plaintiff may not establish specific intent directly. That it did here. Implicit in the finding of "business justification" was the finding that MBNA specifically intended to acquire all the replacement part business. On the instructions on which the verdict of "business justification" had to be based, "business justification" referred to a supposed objective fact, *viz.*, that the tying requirement that *all* replacement parts be obtained from MBNA was the only way that safety and quality of the automobiles could be assured. A finding that MBNA was justified in imposing and enforcing the tie because it was necessary to preserve the quality of its automobile *necessarily* finds that MBNA's *intent* was to reserve all the business of replacement

parts to its dealers. Doubtless that finding included a finding of MBNA's "motive" for seeking to *possess all the parts business*, but there is a time honored difference between "motive" and "intent". Motive is the inducement which leads one to desire a certain result; intent is the purpose to use the particular means to reach the result.[15] A man's "motive" to murder another may be that the victim raped the man's wife, but the "intent" is nonetheless to kill.

Antitrust law is concerned with intent, not with motive. As often as a claim of good "motive" has been advanced as an antitrust defense, this Court has rejected it, *Associated Press v. United States, supra,* 326 U.S. 1, 16, fn. 15 (1945); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101, fn. 23 (1984). Where the assailed conduct consists of exclusion of competition, a motive to benefit the defendant or, in the defendant's judgment, the public, is irrelevant. It is Congress that has declared monopolization to be illegal, regardless of motive.

In any event, if the very "justification" was not conclusive proof of "specific intent", the issue whether there was intent should have been put to the jury.[16]

The short of the matter is that the court below has allowed a "business justification" defense to an attempt to monopolize violation of Sherman Act, § 2, and this holding is in conflict, not only with the principles this Court has pronounced, it is in direct conflict with the Sixth and Eighth Circuits.

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[15] *Hamill v. Maryland Cas. Co.*, 209 F.2d 338, 341 (10 Cir. 1954); *Weir v. Commissioner of Internal Revenue*, 109 F.2d 996, 998 (3 Cir. 1940).

[16] Direct testimony extracted from MBNA's officers and witnesses was that the purpose of the tying clause in the dealer agreement was to obtain *all* the replacement part business of Mercedes dealers. MBNA's president, Karlfried Nordmann, so admitted (Tr. 4-84). The head of its dealer organization, Wayne Armstrong, admitted that the desire to eliminate outside suppliers was "inherent" (Tr. 7, 56-57). Dealers were told that to buy from anyone but MBNA was "in violation of the Torah" (Tr. 5, 167-169).

In *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8 Cir. 1982) the court said (p. 1183):

> "Whether a co-op's given business practice is unlawful thus is not merely a question of whether it is 'predatory' in a strict sense, *e.g.*, lacking a legitimate business justification. As the Sixth Circuit recently noted, '[a]n anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal.' *United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981). That Court squarely rejected the argument that Section 2 prohibits co-op's only from engaging in narrowly defined 'predatory practices.' *Id.* at 194. We agree. . . . Where such an unlawful intent is clear, overt acts in furtherance of this purpose are not immunized simply because they might also have other justifications or because they are merely 'anti-competitive' rather than 'predatory.' "

In *United States v. Dairymen, Inc.*, 660 F.2d 192 (6 Cir. 1981), the court said (pp. 194-95):

> "In this case the district court set too high a burden on the Government when it required the Government to show that D.I.'s practices rose to the level of predatory practices, *i.e.*, anticompetitive practices *without any business justification*. The offense of attempt to monopolize requires only that the defendant has engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful. [Citations omitted.] The district court did not determine whether D.I. used its full supply and committed supply contracts and exclusive hauling contracts with the specific intent to monopolize, and it is necessary to remand this case for that determination.
>
> "Although there is evidence of economic justification for the use of full supply and committed supply contracts, the question of intent is paramount. An anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal."

Business justification has to do with motive. This Court has frequently said that it is Congress that has determined that competition must be free and unrestrained, and, therefore, that it is irrelevant whether a particular restraint is "good" or "fair". All that counts is the impact on competitive conditions; other arguments or considerations are out of place. *United States v. Topco Associates*, 405 U.S. 596, 610-12 (1972).

III

THE DECISION BELOW IS IN CONFLICT WITH ELEMENTARY LAW OF COLLATERAL ESTOPPEL

The jury verdict and decision in *Metrix* held that MBNA's dealer agreement was an unlawful tie and rejected the "business justification" defense. Although the court below held that the *Metrix* decision was a *final one*, it nevertheless refused to hold MBNA barred by collateral estoppel. Its sole basis for that holding was that the two cases are "based on different *evidentiary* facts" (A-11). As the facts supposed to constitute "justification" are precisely the same in the two cases, the statement refers to supposed difference in the *evidence*. It is gratuitous, but we can pass the error, because *difference in evidence is irrelevant*. Nothing is more elementary than that one cannot escape the bar of a former decision by offering new, additional, or different evidence. As 1 B Moore's Federal Practice, pp. 726-727, states:

> "[T]he fact that the prior judgment was simply incorrect will not affect its conclusiveness. This is true *no matter how slight was the evidence* on which a determination was made, in the first suit, of the issue to be collaterally concluded".

As colorfully put in *United States v. Silliman*, 167 F.2d 607, 617 (3 Cir.), *cert. denied*, 335 U.S. 825 (1948):

> "If an issue is raised and the party who has the burden fails in its proof and the issue is decided against him, he is just as much bound by collateral estoppel as though he had presented *a barrel* of testimony."

A multitude of cases so hold. E.g., *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 2 (1 Cir. 1983):

> "Pignons offers new theories, evidence, and arguments. . . . It is just this type of argument, however, that collateral estoppel bars Pignons from making. Pignons had a fair opportunity to make these arguments and to introduce this evidence the first time. The law requires the courts to offer Pignons nothing more, for collateral estoppel implements 'the principle that one opportunity to litigate an issue fully and fairly is enough.' [Citation omitted.] Once a plaintiff has had a chance to prove a fact, he cannot reopen the matter simply by stating that he wishes to introduce more or better evidence". [Citations omitted.]

So also, *Continental Can Co. of U.S.A. v. Marshall*, 603 F.2d 590 (7 Cir. 1979). All that is necessary for a collateral estoppel or issue preclusion is that the party to be bound had a "full and fair opportunity to litigate" the issue, *Blonder-Tongue Labs v. University Foundation, supra*, 402 U.S. 313, 328. MBNA had that opportunity in the *Metrix* trial and exercised it when it was defending against a claim exceeding $7 million. It put in all the evidence it then thought necessary. Having then suffered an adverse verdict, it could avail it nothing to summon more witnesses on the same issue in the *Mozart* trial. To allow it to profit by doing so would be to defy the statement in *Allen v. McCurry*, 449 U.S. 90, 94 (1980):

> "As this Court and other courts have often recognized, *res judicata* and collateral estoppel . . . by preventing inconsistent decisions, encourage reliance on adjudication."

The decision runs afoul of the teaching of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), where the same Ninth Circuit was reversed for disregarding basic principles of *res judicata*. Quoting, the Court stated that it has long recognized that "[p]ublic policy dictates that there be an end of litigation", and that the principle "should be cordially regarded and enforced by the courts" (p. 401). The court below showed a miscomprehension of the law of collateral estoppel as this Court has developed it from *Blonder-Tongue* through *Allen v. McCurry*, when it remarked (A-11):

> "It would be a curious use of affirmative collateral estoppel to permit one who had lost before the jury on certain facts to

> overturn that verdict by pointing out that on different facts, but identical legal principles, the winner before the jury had lost a jury verdict to a stranger on an earlier day and in a different court".

The decision below on this issue is a genetic "sport", one of those aberrations that occasionally bubble to the surface to bedevil the law until authoritatively scotched. We submit that it deserves to be summarily scotched now before it produces mischievous offspring.

IV

The Decision Rests On A Mind-Set That Tying Arrangements Raise No Antitrust Concerns. It Substitutes Word Fomulations For Reality In Rejecting *Digidyne* And In Ignoring The Jury Verdict Of Unreasonableness Under The Rule Of Reason

The opinion refers to the "debate whether tying arrangements raise antitrust concerns" (A-4, 5, fn. 2), and it is animated by the belief that the "Chicago School" is correct in arguing that they do not, undaunted by this Court's reaffirmation in *Hyde* that they do. The verdict of unreasonableness under the Rule of Reason should have obviated resort to the sometimes subtle analysis necessary to determine whether *per se* law applies. Yet the Court of Appeals reasoned as if petitioner's case rose or fell on *per se* law. It dwells on a "*per se* tying standard" (A-4, et seq.) and holds that the instructions to the jury on what constitutes "market power" for a *per se* violation were "flawed".

In its decision of the last several years, limiting *per se* application in antitrust cases, most recently in *Business Electronics Corp., supra*, this Court has emphasized that attention must be given to economic realities rather than to "formalistic distinctions". It is therefore wry that what the opinion below does in its treatment of the subject is to engage in formalistic word distinctions. To borrow the words of Professor Petofsky, quoted at p. 14 of the H.R. Rep. No. 421 referred to in fn. 3, *supra*, it is a "triumph of ideology over practicality, of theory over common sense".

This it does when it holds that a "prestigious trademark" is no evidence of market power. The expression, "prestigious trade-

mark", is merely a figure of speech, a metaphorical way of saying that, for one reason or another, Mercedes-Benz possessed a unique ability to make the opportunity of dealers to buy the automobile for resale so *appealing* that the dealers succumbed to the requirement to buy replacement parts from MBNA.

If a buyer elects to buy one product from the vendor of another product for price, convenience or terms, that is competition at work. But if, extraneous to the merits of the *tied* product, the seller has a leverage, whatever it may be, in the tying product, which compels purchase of the tied product, it should matter not of what the leverage consists. MBNA told this Court in its petition for certiorari in the *Metrix* case (p. 4) that the Mercedes automobile "enjoys public perception of the highest quality" and (p. 23) "consistently has finished at or near the top among all automobiles in consumer satisfaction polls". The evidence established that a dealership to sell Mercedes automobiles in the United States is the *most valuable dealership* in the business, because profits on Mercedes-Benz cars were the greatest in the country. Therefore dealers did not wish to run the risk of losing the dealership. Dealer after dealer testified that they would not sell a Mercedes dealership for $5 million, or $10 million, or for *any* amount of money. But the term of a dealership was only two years and had to be reviewed biannually. A dealership, moreover, was terminable on breach of any clause of the agreement, *including the tying clause.* Rather than risk loss of the dealership, dealers were willing to succumb to the requirement that they buy all replacement parts from MBNA, although it charged from 40% to 60% more for its parts. Mercedes-Benz had *a mystique* that gave it that leverage. The jury's verdict so found. This reality is submerged by the opinion below in abstrusities which replace common sense perception and ill serve antitrust law's emphasis on free competition.

Mozart claimed that the market for sale of replacement parts for Mercedes cars to Mercedes dealers was the relevant market, and that issue was put to the jury by appropriate instruction, with much evidence. The verdict for Mozart on the issue of reasonableness embraced a finding that there was no rival producer of the tying product; only MBNA could supply it; it had 100% of that market.

The court below would deprive a trademark of any weight because a trademark "protects only the name or symbol of the product" and that "market power, if any, is derived from the product" (A-8). This is word-chopping. Name or symbol is merely emblematic of the power of the product.

No one can offer a Mercedes-Benz car for sale but Mercedes-Benz. That car has a mystique that gave its manufacturer the economic power to compel purchase of replacement parts from it. No sound reason can be advanced why that should not be sufficient anticompetitive conduct to concern the law.

CONCLUSION

We respectfully submit that this Court should issue the writ.

Dated: San Francisco, California; June 20, 1988.

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Appendix A

For Publication

United States Court of Appeals
For the Ninth Circuit

Nos. 86-1733;
86-2156

D.C. No.
CV-81-0531-MHP

The Mozart Company, a corporation,
Plaintiff-Appellant,

v.

Mercedes-Benz of North America, Inc., a corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
May 13, 1987—San Francisco, California

Filed December 9, 1987

Before: Joseph T. Sneed, Arthur L. Alarcon and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Sneed

OPINION

COUNSEL

Moses Lasky, Lasky, Haas, Cohler & Munter, San Francisco, California, for the plaintiff-appellant.

George A. Cumming, Jr., Brobeck, Phleger & Harrison, San Francisco, California, for the defendant-appellee.

OPINION

Sneed, Circuit Judge:

Mozart Co. (Mozart), an auto parts distributor and manufacturer, alleged various antitrust violations by Mercedes-Benz of North America, Inc. (MBNA), arising out of MBNA's franchise agreements with its dealerships. The agreements required each franchisee to deal exclusively in replacement parts supplied by MBNA. Following an eleven-week jury trial, the jury rendered a special verdict, finding that, although MBNA had violated the Sherman Act by way of a tying arrangement, there was a business justification for the conduct. The district court entered judgment for MBNA without submitting Mozart's other claims to the jury. Mozart appeals the district court's judgment that it take nothing, and also appeals the court's award of costs to MBNA. We affirm.

I

FACTS AND PROCEEDINGS BELOW

Defendant-appellee MBNA has been the exclusive United States distributor of Mercedes-Benz automobiles since 1965. MBNA is a wholly-owned subsidiary of Daimler-Benz Aktiengesellschaft (DBAG), the German manufacturer of Mercedes automobiles and their replacement parts. Daimler-Benz of North America, Inc. (DBNA) is the exclusive United States importer of DBAG products.

MBNA markets its passenger cars and genuine and approved replacement parts through approximately 400 franchised dealerships. Each dealer becomes party to a standard written Dealer Agreement, the second part of which contains numerous "Standard Provisions." Paragraph 9C of that part of the agreement provides:

> Dealer shall neither sell or offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

Part one of the Dealer Agreement defines "MB parts" as "parts, accessories, components, assemblies, and optional equipment for MB passenger cars supplied by MBNA, DBAG, or DBNA."

In January, 1982, plaintiff-appellant Mozart, successor in interest to Eurasian Automotive Products, Inc., a wholesale automotive parts distributor, brought suit against MBNA for alleged violations of §§ 1 and 2 of the Sherman Act, and § 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14. Mozart based its case on Paragraph 9C of the Dealer Agreement between MBNA and each Mercedes-Benz franchised dealer. It contended that it constituted a per se tying violation of 15 U.S.C. §§ 1 and 14. Mozart alleged additionally that MBNA conspired with the franchised dealers to boycott independent replacement parts distributors, in further violation of § 1, and also that MBNA attempted to monopolize the sale in the United States of replacement parts usable in Mercedes automobiles in violation of § 2. The complaint charged improper conduct between the years 1975 and 1979.

In September, 1984, the district court denied the parties' cross-motions for summary judgment in a published opinion and order. *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506 (N.D. Cal. 1984). The court found that the Mercedes passenger car and its replacement parts were separate products tied together by the terms of Paragraph 9C of the MBNA Dealer Agreement, and that the tying arrangement affected a substantial amount of interstate commerce. *Id.* at 1523. The matter proceeded to trial on the issues of: (1) whether MBNA had sufficient economic power in the tying product market to restrain competition in the tied product market; (2) whether MBNA had a legitimate business justification for the tying arrangement; and (3) the conspiracy and monopoly claims. *Id.* at 1523-24.

Trial began August 6, 1985. At the close of Mozart's case in chief, the court granted MBNA's motion for a directed verdict on the conspiracy to boycott claim. At the close of all the evidence, the court submitted the case to the jury only under the Sherman Act § 1 tying claim. It declined to give to the jury the attempted monopolization and Clayton Act § 3 claims. The jury returned a special verdict, finding that MBNA had violated Sherman Act § 1 under both the per se test and the Rule of Reason Test, but that MBNA had a business justification for its tying arrangement. The district court untangled matters by determining that MBNA had not violated § 1.[1] The court denied Mozart's motion for judgment notwithstanding the verdict. The district court then directed a verdict for MBNA on the Clayton Act § 3 and Sherman Act § 2 claims. On November 20, 1985, the court rendered its final judgment that Mozart take nothing. Mozart timely filed a notice of appeal. On June 2, 1986, the district court taxed costs of $110,877.23 against the plaintiff. Mozart also filed an appeal from this post-judgment order.

As indicated above, we affirm. To do so we need address in depth only appellant's contentions that the district court erred in refusing to invoke collateral estoppel as appellant insisted it should and that the business justification defense was inapplicable as a matter of law. First, however, we shall explain why these two issues are controlling in our view.

II

THE PER SE TYING STANDARD

In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), a bare majority reaffirmed the per se rule against tying.[2]

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[1] Technically, there is no "violation" of the Sherman Act if the defendant prevails on a business justification defense. *See infra* section IV.

[2] Two Justices relied on Congress' silence as a justification for preserving the per se rule. *See* 466 U.S. at 32 (Brennan, J., concurring). Four Justices, recognizing that tying arrangements may have procompetitive effects, would analyze these arrangements under the Rule of Reason. *See id.* at 32-47 (O'Connor, J., concurring). Thoughtful antitrust scholars have expressed serious doubts about the alleged anticom-

The majority opinion concluded that it was "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition." *Id.* at 9. Three elements are necessary to establish a per se illegal tying arrangement: "(1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a non-insubstantial volume of commerce in the tied product market. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys.*, 732 F.2d 1403, 1407 (9th Cir. 1984). As stated previously, the district court determined as a matter of law that the Mercedes passenger car and its replacement parts were separate products tied together by the terms of paragraph 9C of the MBNA Dealer Agreement, and that the tying arrangement affected a substantial amount of interstate commerce. 593 F. Supp. at 1523. The market power issue, the second element of the per se standard, was submitted to the jury, and the jury found that MBNA possessed the requisite power in the tying product, the Mercedes passenger car.

The majority in *Hyde*, rather than abandoning the per se rule against tying, chose to limit antitrust liability for tie-ins by insisting on a showing of actual market power in the tying product. 466 U.S. at 13-17. Tying arrangements receive per se condemnation "when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Id.* at 13-14. The primary purpose of the rule against certain tying arrangements is to stop the extension of market power from one product to

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petitive effects of tie-ins. *See* 5 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 1129c, 1134b (1980); R. Bork, *The Antitrust Paradox* 372-75 (1978); *see also Hirsch v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1349 n.19 (9th Cir.) (criticizing reasons asserted in support of the antitrust law's harsh treatment of tying arrangements), *cert. denied*, 459 U.S. 973 (1982). The close division on the rationale in *Hyde* was attributable in part to the debate over whether tying arrangements raise antitrust concerns.

another.[3] *Id.* at 13 & n.19. Such extension of power is impossible unless the seller has substantial market power in the tying product.

The instructions employed in submitting this issue to the jury were flawed, however. That flaw pertained to the "market power" that the defendant must possess in the tying product to justify the invocation of the per se standard. The required "market power" must be sufficient "to force a purchaser to do something he would not do in a competitive market." 466 U.S. at 14. Such "forcing" is the equivalent of increasing the price of the tying product to increase profits. *Id.* at 27 n.46. Such power is the hallmark of monopoly power, *viz.*, the ability to increase price by restricting output.

In *Hyde,* the Court identified three sources of market power. First, when the government has granted the seller "a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." 466 U.S. at 16 (citing *United States v. Loew's, Inc.*, 371 U.S. 38, 45-47 (1962)). The second is when "the seller's share of the market is high." *Id.* at 17 (citing *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 611-13 (1953)). The third is when "the seller offers a unique product that competitors are not able to offer." *Id.* Mozart's theory of this case is that the Mercedes automobile is sufficiently unique to confer economic power on MBNA in the tying product.

The district court properly instructed the jury that the Mercedes-Benz franchise trademark and the Mercedes-Benz automobiles together constitute the tying product. Reporter's Transcript

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[3] This so-called "leverage theory" has been criticized because modern economic thought seems to indicate that all available monopoly profits could be obtained from the tying product alone without the use of a tie-in. *See* R. Bork, *supra,* at 373. Tying arrangements are also viewed with disfavor because they can be used to facilitate price discrimination. Where the quantity of sales of the tied product measures the buyer's intensity of use of the tying product, the seller may be able to exact a premium from the more intensive users by charging above-cost prices for the tied product. There are no allegations that the tying arrangement here fosters price discrimination.

(R.T.) of Oct. 18, 1985, at 23. The jury also was instructed, in part, as follows:

> In deciding whether MBNA had sufficient leverage, you may consider the fact that MBNA controlled who could use the Mercedes trademark and whether the trademark had any goodwill among the car-buying public. A prestigious and desirable trademark can be persuasive evidence of economic power.
>
> MBNA had the necessary leverage if the evidence shows that the Mercedes automobile was sufficiently unique to give MBNA a competitive advantage in the sale of automobiles. If new Mercedes cars were sufficiently desirable to dealers, then MBNA was likely to have sufficient leverage to restrain the tied product market; that is, the market for replacement parts sold to Mercedes dealers and necessary to the mechanical operation of the Mercedes car.

Id. at 26. These two instructions reveal the flaws referred to above.

First, a prestigious trademark is not itself persuasive evidence of economic power. It is true that we have previously held that *copyright* protection may be evidence of market power because it creates barriers to entry for competitors in the tying market. *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1341 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985).[4] However, unlike a patent or copyright, which is designed to protect the uniqueness of

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[4] To the extent that the panel's opinion in *Digidyne* indicates that the presumption of market power is warranted merely by the existence of copyright protection, the *Digidyne* view has been rejected by several courts and commentators. *See, e.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1659 (1986); Note, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 Colum. L. Rev. 1140, 1156 (1985); *see also Hyde*, 466 U.S. at 37 n.7 (O'Connor, J., concurring) (patent holder has no market power if there are close substitutes for the patented product). Two Justices who favor retention of the per se rule against tie-ins would have granted certiorari in *Digidyne* because of the panel's failure to

the product itself, a trademark protects only the name or symbol of the product. Market power, if any, is derived from the product, not from the name or symbol as such. *See* Klein & Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J. Law & Econ. 345, 356 (1985).

Second, the court's instructions indicate that somehow market power can be proven from the uniqueness of the Mercedes automobile. The difficulty with this is that while many individual purchasers of automobiles undoubtedly regard a Mercedes as unique, it is by no means clear that franchisees (dealers) view the Mercedes in the same manner. To them it is an article that is purchased at wholesale and sold at retail. The critical issue is whether MBNA possesses the "market power" to force dealers to purchase the tied product rather than acquire the franchise to sell a different automobile. Obviously there are costs in surrendering one franchise and acquiring another, but these are costs unrelated to the "market power" of a unique automobile. These costs will enable the car maker to extract concessions from the dealer, but this power is related to the franchise method of doing business, not to the possible uniqueness of the car. The upshot is that the district court's jury charge was improperly focused. It fails to anticipate adequately the basic fact that the "market" at issue is the market for dealership franchises.

However, we do not find that the flawed instructions necessitate a reversal of the judgment. The instructions were more favorable to the appellant than would be a proper recasting. We turn now to the crucial issues of this case.

III

COLLATERAL ESTOPPEL

It so happened that *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, No. CV-N-79-2066, was pending in the federal district court for the District of Maryland as this case unfolded below. The *Metrix* case involved claims and issues quite similar to those in this case. Metrix, an independent distributor of

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engage in market analysis. *See* 473 U.S. 908 (1985) (White, J., joined by Blackmun, J., dissenting from denial of certiorari).

replacement parts, brought suit against MBNA on a tying charge under Sherman Act § 1. The jury in *Metrix*, rejecting the business justification defense accepted by the jury in this case, returned a verdict against MBNA for damages of $2.3 million, and judgment upon that verdict was entered. These events occurred before the present case went to trial.

Based upon the jury verdict in *Metrix*, Mozart moved to have MBNA adjudicated as collaterally estopped from contesting its liability under Sherman Act § 1. On June 3, 1985, the district court tentatively ruled that there was a collateral estoppel. Court Record (C.R.) at 547. However, on June 19, 1985, the *Metrix* court awarded a new trial on the issue of damages. Upon this new development the district court in this case refused to apply collateral estoppel. The court ruled that the judgment in *Metrix* lacked the requisite degree of finality to support collateral estoppel. C.R. at 548.

On October 7 1985, the *Metrix* court granted MBNA leave to file an interlocutory appeal with respect to liability and several other issues under 28 U.S.C. § 1292(b). The Fourth Circuit accepted the appeal, and a cross-interlocutory appeal by *Metrix*, and decided the case on September 14, 1987, a date subsequent to the submission of this appeal for decision. *See Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987). The issues disposed of by the Fourth Circuit are succinctly stated to have been as follows:

> As presented by the parties on appeal, and as interpreted by this court, the issues raised by the certified questions are whether *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936), established an automobile exception to Sherman Act liability for tying arrangements; whether MBNA proved as a matter of law that its tying arrangement was based on a legitimate business justification; whether the jury's Sherman Act damage award was against the clear weight of the evidence; and whether the district court misapplied the standards for granting a judgment notwithstanding the ver-

> dict or, alternatively, a new trial on MBNA's Robinson-Patman Act counterclaim.

Id. at 1035 n.4.

The Fourth Circuit's disposition of these issues was (1) that *Peck* did not establish a "broad-based exception to the Sherman Act," *id.* at 1039; (2) that MBNA's evidence in support of its business justification defense would not support a directed verdict and judgment notwithstanding the verdict and that the jury instructions with respect to the burden of proving business justification were not improper; (3) that the trial court did not abuse its discretion in granting MBNA a new trial on damages, *id.* at 1042-45; and (4) that the district court erred in granting a judgment notwithstanding the verdict, or, alternatively, a new trial on MBNA's Robinson-Patman Act counterclaim.

Mozart in its briefs and oral argument insisted that, even though the Fourth Circuit's decision in *Metrix* had not been handed down, it nonetheless collaterally estopped MBNA from contesting its Sherman Act liability. This led to argument concerning the type of finality that a prior judgment must have to permit its use for purposes of collateral estoppel. *See Luben Indus. v. United States,* 707 F.2d 1037 (9th Cir. 1983). Also at issue was the point in time such required finality must be attained to justify overturning a judgment of the district court which, as is the situation in the case before us, had refused to invoke collateral estoppel.

The Fourth Circuit's decision significantly alters the focus of our concerns. We recognize that its decision possesses the required attributes of finality. We also are now persuaded that the fact that this decision is subsequent in time to the district court proceedings in the case before us does not bar any preclusive effect that the *Metrix* case might possess. In reaching this conclusion, we are guided by *Los Angeles Unified School District v. Los Angeles Branch, NAACP,* 714 F.2d 935, 939-40 (9th Cir. 1983), which gave a state court decision, that became final after the judgment of the district court, preclusive effect on the review of that judgment on appeal. Therefore, we now turn our attention to *Metrix* to determine whether it affords Mozart the means by which the jury verdict against it can be overturned.

We hold that it does not. We start from the proposition that the case before us is based on different evidentiary facts from those in *Metrix*. Moreover, *Metrix* involved no principle of law that should collaterally estop MBNA from asserting its business justification defense and from resisting successfully any effort to overturn the jury verdict in its favor.

The precise holdings of the *Metrix* court make this clear. The rejection of *Peck* as the basis of any exception to the Sherman Act by *Metrix* does not impair MBNA's jury verdict. It never seriously relied on *Peck*. More importantly, it did not win on that basis. Its victory rested on the acceptance by the jury of MBNA's business justification defense. *Metrix* did not reject the business justification defense: it merely held that in that case the evidence presented by MBNA to make out that defense was not sufficiently strong to support setting aside a jury verdict holding that no such defense was established. MBNA in this case established to the satisfaction of the jury that a business justification did exist. It would be a curious use of affirmative collateral estoppel to permit one who had lost before the jury on certain facts to overturn that verdict by pointing out that on different facts, but identical legal principles, the winner before the jury had lost a jury verdict to a stranger on an earlier day and in a different court. Issue preclusion in its affirmative form is not that expansive. Finally, it is abundantly clear that the *Metrix* holdings regarding the granting a new trial on damages and the Robinson-Patman Act counterclaims have no bearing on this case.

We hold, therefore, that the district court did not abuse its discretion in refusing to permit Mozart to invoke collateral estoppel.

IV

BUSINESS JUSTIFICATION

This brings us to the heart of this case, whether the tying arrangement was justified by business necessity. We have recognized that antitrust defendants may demonstrate a business justi-

fication for an otherwise per se illegal tying arrangement.[5] *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1482 (9th Cir. 1983); *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1225-28 (9th Cir. 1982); *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 738-39 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977). A tie-in does not violate the antitrust laws "if implemented for a legitimate purpose and if no less restrictive alternative is available." *Phonetele*, 664 F.2d at 739. The defendant bears the burden of showing that the case falls within the contours of this affirmative defense. *Id.*

The justification asserted by MBNA is that the tying arrangement is necessary to assure quality control and to protect its goodwill. The difficulty confronting MBNA is the problem of "freeriding" by Mercedes dealers. To MBNA it is crucial that a dealer operating under a franchise distribution arrangement offer standardized products. Only then can customers confidently rely on the Mercedes name. Franchisees, on the other hand, experience a conflict of interest. True, they wish to maintain the goodwill of MBNA, but some will yield to avarice and increase their profits by supplying inferior products while continuing to attract customers at the expense of those dealers who conform to the quality standards. The cost of these transgressions will be borne by all franchisees in the form of decreased future demand. Although a consumer may realize that a particular franchisee "cut the corner," the adverse reaction of consumers as a group is not confined to that particular franchisee because they are appro-

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[5] It may seem somewhat anomalous to permit justifications for arrangements that are apparently subject to per se condemnation. However, per se rules are simply examples of presumptions that exist throughout antitrust law, and "easy labels do not always supply ready answers." *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 8 (1979). Before applying the per se label we must determine whether the challenged practice is one of those types that "is 'plainly anticompetitive' and very likely without 'redeeming virtue.'" *Id.* at 9. Allowing the defendant to assert a business justification defense is one way of inquiring into whether the reasons for the relatively categorical historical condemnation of tie-ins apply to the challenged arrangements.

priately reacting to the poor job of policing done by the franchisor. In plain fact, the "corner cutter" imposes costs on all concerned with the product.

To exonerate a franchisor's tie-in quality control technique from the antitrust law, there must be a finding that no less restrictive alternative exists.[6] Frequently less restrictive alternatives do exist. *See e.g., Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 397-98 (1947); *International Business Machs. Corp. v. United States*, 298 U.S. 131, 138-40 (1936); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 46-47 (5th Cir. 1976); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

It has been suggested that the quality control defense be viewed with less skepticism than it usually has been accorded. It has been argued that tying arrangements are more effective and less costly than alternative methods for ensuring franchisee compliance with quality specifications. Simply specifying quality standards contractually will be ineffective because, as already pointed out, the franchisee has a financial incentive to "cut corners," to "freeride." The franchisor must police compliance with the specifications, and policing costs will be substantial, if not prohibitive. The fact that quality specification is possible does not mean, therefore, that the tie-in is not necessary to assure high-quality products. *See*

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[6] The most notable exception to the general rejection of the quality control defense is *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). There the court held that Jerrold's requirement that buyers of its television system also purchase installation and repair service was necessary to protect Jerrold's business reputation. *Id.* at 557-60. However, the court seemed to limit the defense to nascent firms entering a technologically complex industry. *Id.* at 560.

The quality control defense was also successful in *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965). The *Susser* court held that the tie of ice cream purchases to a trademark license was legitimate because it would have been difficult to specify contractually the "desired texture and taste of an ice cream cone or sundae." *Id.* at 520.

Klein & Saft, *supra*, at 351-54 (discussing tie-ins as a mechanism to economize on policing costs). Furthermore, penalties against the "corner cutters" must be imposed. Termination of the "corner cutter's" franchise may be difficult to achieve because, *inter alia*, inasmuch as standards generally do not capture all elements of quality, breach may be difficult to prove. *Id.* at 353 & n.26.

Designating particular suppliers, a possible alternative to quality specification, requires policing compliance at the manufacturer level, which may be just as difficult as at the franchisee level. Moreover, the suppliers also will be under competitive pressure to "cut corners" by supplying low-quality products to franchisees who are more concerned with price than quality. Even if the franchisor buys from the same suppliers as do the franchisees, there is no certainty that the products purchased by franchisees will be of equal quality. To ascertain the quality of parts purchased by franchisees would require quality control testing at the franchisee level. In sum, designating a supplier would require testing at both supplier and purchaser-franchisee level. For these reasons, it has been argued that the efficiency loss from alternative methods of quality control may outweigh any potentially anticompetitive effects of a tying arrangement. With this background we now turn to the alleged justification in this case.

We begin with the fact that, pursuant to instructions that Mozart does not, and could not, challenge, the jury found in MBNA's favor. These instructions were in accordance with the prevailing law regarding business justification.[7] Mozart, from

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[7] The instructions were as follows:

> If you find that the tying agreements in this case were unlawful either because they were per se violations of the Sherman Act or because they were unreasonable under the Rule of Reason test, you must then determine whether they were warranted by a business justification. The burden is on the defendant to demonstrate the existence of a business justification. And again, you will recall the burden of proof that I explained to you earlier, but for this purpose, that burden is upon the defendant.
>
> In considering the question of business justification, you must bear in mind that a tying agreement can be justified only if there is no less restrictive alternative. Even if some sort of regulation is

necessity, rests its appeal on a challenge to the sufficiency of the evidence. We will affirm the jury verdict and the denial of Mozart's motion for judgment n.o.v. if there is substantial evidence to support a finding for MBNA. *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1442 (9th Cir. 1986). We are not free to reweigh the evidence or reach a result we find more reasonable if, viewing the evidence in the light most favorable to MBNA, there is substantial evidence in favor of the jury's verdict. *Wilcox v. First Interstate Bank*, 815 F.2d 522, 525 (9th Cir. 1987).

Mozart contends that the business justification defense fails for two reasons: 1) the quality control justification is without merit, because replacement parts of appropriate design and quality are available from other sources, and 2) even if the quality control concern is legitimate, less restrictive alternatives for achieving the same goal are available.

Substantial evidence exists to support MBNA's claim that the tie-in was used to assure quality control. MBNA purchases approximately 80% of its replacement parts from DBAG. Of those parts half are manufactured by DBAG itself, and half are acquired by DBAG from other original equipment manufacturers (OEMs). These OEMs produce the parts according to DBAG manufacturing and quality control specifications. A selection of

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reasonably necessary to promote the business of the parties, a less restrictive regulation must be adopted instead of a more restrictive one. No anticompetitive restraint is permissible which is broader or more onerous than reasonably necessary to achieve a goal even where the goal is legitimate.

Defendant's claimed business justification is that the restraint protected the quality of the Mercedes automobile. In order to establish its business justification defense, defendant must show that the tying arrangement was necessary to protect the quality of the automobiles, and that replacement parts of appropriate quality are unavailable from sellers other than defendant itself. In other words, defendant cannot prevail on its business justification defense unless it has sustained its burden of proving that its tying arrangement is the only way the safety and quality of MB cars can be assured.

R.T. of Oct. 18, 1985, at 40-41.

each shipment of OEM parts, which has already passed through one round of inspection, is tested a second time by DBAG. If any of the test parts is deficient, the whole lot is rejected. The remaining 20% of the replacement parts purchased by MBNA come directly from OEMs that have met DBAG's quality and inspection standards. Thus, most, but not all, of MBNA parts are subjected to DBAG's elaborate and rigorous inspection procedures. Mozart purchased most of the parts it sold from OEMs in the United States.

MBNA introduced evidence showing that DBAG's strict testing standards helped to assure the high quality of replacement parts. R.T. at 31-13 to 25; 19-45 to 49. MBNA maintains an excellent reputation in the automobile industry for reliable service and quality replacement parts. In fact, 75% of Mercedes automobile owners are repeat purchasers, and over one-third of the owners return to the dealer for service and repairs. *Id.* at 29-179 to 29-190. There was considerable testimony by dealers and employees of MBNA about the inferiority of parts supplied by independent jobbers. *Id.* at 25-180 to 183; 23-17, 18; 28-104 to 107; 29-130 to 133; 31-5 to 31-12. Although Mozart introduced evidence to the contrary, the jury was entitled to make credibility determinations in favor of MBNA. We hold that there was ample evidence to support a finding that the tying arrangement is a legitimate means of maintaining the quality of Mercedes replacement parts supplied by dealers, and thereby protecting the reputation of the MBNA product.

Mozart argues alternatively that, even if MBNA's alleged justification is legitimate, the quality control defense fails because MBNA neglected to utilize less restrictive alternatives. The jury's verdict could have been reached only by its determination that there was no less restrictive alternative. *See* R.T. of Oct. 18, 1985, at 40-41. No other conclusion is possible so long as it is assumed, as we must, that the jury followed its instructions.

Mozart insists that MBNA could have furnished manufacturing specifications for replacement parts, and that such specification would eliminate the need for a tie-in. The jury rejected this contention. Mozart is right, of course, when it insists that MBNA could have furnished design specifications for Mercedes replace-

ment parts. That alone, however, does not eliminate the business justification defense. MBNA proffered evidence that DBAG's vigorous testing programs could not be replicated by individual dealerships. *Id.* at 31-38, 39; 27-8, 9; 22-40 to 42. The evidence further indicates the impracticality of Mozart's suggestion that MBNA could have inspected all replacement products furnished to independents. There was evidence from which the jury could find that the cost of such an undertaking would be prohibitive. We do not believe MBNA was required as a matter of law to take such extreme steps to protect its legitimate interest in assuring public confidence in the quality of its trademarked product. There is substantial evidence to support the jury's finding that the only feasible method for maintaining quality control is the use of the tying arrangement. Therefore we affirm the judgment for MBNA on the Sherman Act § 1 tying claim.

V

OTHER CLAIMS

In addition to the claim of illegal tying, Mozart slightly recast that claim by alleging the MBNA engaged, with its dealers, in a conspiracy to boycott independent distributors. The district court granted a directed verdict for MBNA at the close of plaintiff's evidence. A defendant may "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." ***Richards v. Neilson Freight Lines***, 810 F.2d 898, 902 (9th Cir. 1987). "Once a defendant has met this initial burden, a plaintiff must provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently." *Id.*

MBNA offered the plausible business justification of quality control as a reason for its "tying" agreements with all 400 dealers. Mozart points to no specific evidence tending to establish that MBNA was acting in concert with its dealers to protect MBNA and the dealers from competition. We, therefore, affirm the district court's directed verdict on the conspiracy to boycott claim.

Mozart also contests the district court's grant of a directed verdict on its Clayton Act § 3 claim and its Sherman Act § 2 attempt to monopolize claim. The district court held that the

jury's finding of business justification disposed of these claims as well as the Sherman Act § 1 tying claim.

We have stated that the elements for establishing a Sherman Act § 1 claim and a Clayton Act § 3 claim are virtually the same. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1189 n.2 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985). There is no reason for allowing a business justification for a § 1 claim and not for a § 3 claim. To our knowledge no court has ever made such a distinction. Courts permit a business justification defense to tying claims because of a frank recognition that a package transaction with substantial justifications and few harmful effects should not be condemned. That recognition appplies with equal force to the Sherman Act and the Clayton Act. The § 3 claim fails with the § 1 claim.

In order to support an attempt to monopolize claim the plaintiff must prove specific intent, which must be shown by proof of unfair or predatory conduct. *Drinkwine v. Federated Publications*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 106 S.Ct. 1471 (1986). Predatory conduct is "conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition." *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986).

A tying agreement supported by a legitimate business justification cannot be characterized as the type of predatory anticompetitive, or unfair conduct that is necessary to support a Sherman Act § 2 claim. Mozart's failure to prove its tying claim precludes it from asserting an attempt to monopolize claim arising out of the same conduct. *See Airweld*, 742 F.2d at 1191 n.3.

The district court properly granted a directed verdict on the Clayton Act § 3 and the Sherman Act § 2 claim.

IV

COSTS

Mozart seeks to have the award of costs against it overturned. Because we affirm the judgment for MBNA, we also affirm the

award of costs against Mozart. Costs of this appeal are also assessed against Mozart.

The judgment of the district court is AFFIRMED.

Appendix B

United States District Court,
N.D. California.

No. C-81-0531-MHP.

The Mozart Company, a corporation,
Plaintiff,

v.

Mercedes-Benz of North America, Inc., a corporation,
Defendant.

Sept. 18, 1984.

Moses Lasky, Lasky, Haas, Cohler & Munter, San Francisco, Cal., for plaintiff.

Malcolm T. Dungan, George A. Cumming, Jr., Michael B. Flesch, Brobeck, Phleger & Harrison, San Francisco, Cal., for defendant.

OPINION AND ORDER

PATEL, District Judge.

This is an antitrust action, presently before the court on cross-motions for summary judgment. Plaintiff The Mozart Company, successor in interest to Eurasian Automotive Products, Inc., a wholesale automotive parts distributor, brought suit against defendant Mercedes-Benz of North America ("MBNA") alleging violations of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14. Mozart contends that provisions of the Dealer Agreement between MBNA and each Mercedes-Benz franchised dealer constitute a per se tying violation of 15 U.S.C. §§ 1 and 14. Plaintiff alleges additionally that MBNA conspired with the franchised dealers to boycott independent replacement parts distributors, such as Eurasian, in further violation of § 1, and also attempted to monopolize the sale in the United States of replacement parts usable in Mercedes automobiles in violation of § 2. Defendant objects to the use of a per se rule and argues that a rule of reason standard should apply in this case. Since, according to defendant, the evidence Mozart has

introduced concerning MBNA's alleged conduct involving threats, coercion and intimidation would be insufficient to permit plaintiff to prevail under a rule of reason standard, defendant's motion for summary judgment should be granted.

This court has had previous occasion to deal with most of the issues raised in this litigation. In *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369 (N.D.Cal.1981) ("*MBNA*"), after detailed consideration of the arguments raised by both parties, the court held that the per se standard applied. It then proceeded to deny both the government's and MBNA's motions for summary judgment and ordered the case to proceed to trial on "the issue of defendant's economic power and, if that be established, whether defendant can demonstrate sufficient business justification for a tying arrangement." *Id.* at 1373. At the same time, the court held that no factual dispute existed as to whether the Mercedes-Benz automobile and Mercedes replacement parts were two separate products tied together by the MBNA Dealer Agreement, or whether the agreement affected a not insubstantial amount of interstate commerce. *Id.* at 1391.

Other courts have also considered tying arrangement claims brought against MBNA. In *IAP, Inc. v. Mercedes-Benz of North America, Inc.*, 571 F.Supp. 262 (D.N.J.1983) ("*IAP*"), the court went on at some length about the history of automobile production in general and the manufacture of replacement parts in particular. *Id.* at 265-67. It then cited *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir.), *aff'd per curiam*, 299 U.S. 3, 57 S.Ct. 1, 81 L.Ed. 4 (1936), which held that since "[t]he preservation of the good will of the public is directly involved," General Motors did not violate § 3 of the Clayton Act by requiring Chevrolet and Buick dealerships to sell only genuine GM replacement parts or parts authorized by GM. 80 F.2d at 643-44. According to the *IAP* court, *Pick* created an automobile replacement parts "exception" to antitrust law that, in essence, forecloses any tying claim of this sort against any automobile manufacturer. 571 F.Supp. at 167-68.[1]

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[1] The specific issue before the *IAP* court was whether plaintiffs, instead of meeting defendant's motion for summary judgment, could dismiss their complaint with prejudice to themselves and without costs,

In another action against Mercedes, *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 1982-2 Trade Cas. (CCH) ¶ 64,861 (D.Md.1982) ("*Metrix I*"), the court denied both parties' motions for summary judgment for substantially the same reasons as this court did in *MBNA*. *Id.* at 72,280. Following the decision in *IAP*, however, the *Metrix* court reconsidered its earlier opinion, concluded that *Pick* was controlling precedent, and granted summary judgment in favor of Daimler-Benz and MBNA. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 1984-1 Trade Cas. (CCH) ¶ 65,766 (D.Md.1982) ("*Metrix II*"). Then, following the opinion of the Supreme Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* ____ U.S. ____, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) ("*Hyde*"), the court determined that its second opinion in the case had been "premature," concluded that *Hyde* showed the notion of a *Pick* exception to be untenable, vacated *Metrix II*, and reinstated *Metrix I*. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, No. N 79-2066 (D.Md. June 11, 1984) ("*Metrix III*").

Now this court must decide once again whether summary judgment should be in favor of or against MBNA. After thorough consideration of the extensive documentary evidence, memoranda, and oral argument presented by both parties, the court has concluded that it must deny both motions for summary judgment. The court has found no reason to disturb its previous determination that a per se standard should be used to test the alleged tying violation at issue here. It also remains clear that Mercedes-Benz automobiles and Mercedes replacement parts are two separate products tied together by the MBNA Dealer Agreement, and that this arrangement affects a not insubstantial amount of interstate commerce. Substantial factual disputes exist regarding whether MBNA had sufficient economic power to coerce its dealers into the tying arrangement and a conspiracy to boycott, and, if that is

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but without prejudice to members of a purported class of plaintiffs which they attempted to have certified. 517 F.Supp. at 263-65. The court determined, *inter alia*, that since defendant had gone to great expense and trouble to prepare its motion for summary judgment, and plaintiffs had never met that motion as required by the Rules of Civil Procedure, defendant's motion for summary judgment would be granted. *Id.* at 269-70. The court's discussion of the nature of plaintiffs' claim and the *Pick* "exception" was therefore unnecessary in deciding the issue before it.

demonstrated, whether MBNA had sufficient business justification for its conduct. There is also dispute regarding the issue of MBNA's attempt to monopolize the sale of Mercedes replacement parts.

I. Factual Background[2]

Defendant MBNA, since 1965 the exclusive United States distributor of Mercedes-Benz automobiles, markets its passenger cars and genuine and approved replacement parts through approximately 400 franchised dealerships.[3] Each dealer becomes party to a standard written Dealer Agreement, the second part of which contains numerous "Standard Provisions." Paragraph 9C of that part of the agreement provides:

> Dealer shall neither sell or offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

Part one of the Dealer Agreement defines "MB parts" as "parts, accessories, components, assemblies, and optional equipment for MB passenger cars supplied by MBNA, DBAG,[4] or DBNA."[5]

Plaintiff rests its claim of a per se illegal tying arrangement on Paragraph 9C quoted above. Mozart contends further that in connection with this arrangement MBNA coerced its dealers into

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[2] For a more detailed discussion of MBNA's operational structure and parts distribution system, see this court's opinion in *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369, 1373-74 (N.D.Cal.1981).

[3] This case deals only with replacement parts. It is not argued nor could it be that parts for original use are separate products. Furthermore plaintiff's claim does not involve warranty parts. (Pl.'s Mem.Supp.Summ.Judgment, at 48; Pl.'s Reply Mem., at 23).

[4] Daimler-Benz A.G., the manufacturer of Mercedes automobiles, trucks and other vehicles, and their replacement parts.

[5] Daimler-Benz of North America, Inc., the exclusive United States importer of DBAG products.

a conspiracy to boycott all independent replacement parts distributors, such as Eurasian Automotive Products, and also attempted to monopolize the sale of Mercedes replacement parts in the United States.

II. The Applicable Standard

In *MBNA*, defendant's primary arguments in favor of its own motion for summary judgment were that "because of the nature of its franchise [arrangements], per se tying standards are inapplicable and that a rule of reason is the appropriate standard for determining restraint of trade." 517 F.Supp. at 1374. Even though this court determined in that action that a per se tying standard did indeed apply, MBNA repeats the same argument in this proceeding, contending that the cases of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) and *Jefferson Parish Hospital Dist. v. Hyde, supra*, plus a series of franchise/trademark cases decided by the Court of Appeals for the Ninth Circuit, compel a different result. According to Mercedes, these cases, taken together, stand for the proposition that tying arrangements are not per se illegal unless they are imposed upon the ultimate consumer. This means, contends defendant, that the law of tying essentially has no application to exclusive dealing arrangements between franchisors and franchisees. These remarkable conclusions do not find support in the authority MBNA cites. Neither *GTE Sylvania* nor *Hyde* provides a basis for the argument that a per se standard should not apply in this case, and the Ninth Circuit cases relied upon only support the theory that MBNA "may condition the sale of the passenger *car* on use of the Mercedes-Benz trademark." *MBNA*, 517 F.Supp. at 1374 (emphasis in original).[6]

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[6] These cases, *California Glazed Products, Inc. v. Burns & Russell Co.*, 708 F.2d 1423 (9th Cir.) *cert. denied*, __ U.S. __, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983); *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir.) *cert. denied*, __ U.S. __, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir.1982); and *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir.1982) all consider whether the products involved in the alleged tying arrangements were "separate products," not

As this court pointed out in *MBNA, GTE Sylvania* essentially overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) and criticized the *Schwinn* court for departing from a long line of authority treating vertical restrictions as subject to the rule of reason and for adopting the per se rule without performing the analysis required by *Northern Pacific Railway Co. v. United States* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). While some may have believed *GTE Sylvania* argued the Supreme Court's abandonment of the per se rule, *Hyde* certainly has dispelled that notion insofar as tying arrangements are concerned. Unlike its observation in *GTE Sylvania* that some vertical restrictions have an economic benefit, the court in *Hyde*, using a *Northern Pacific* analysis, announced its continuing belief that most tying arrangements are inherently anticompetitive.[7] Furthermore, application of the per se rule to tying arrangements has a thirty-seven year history. By contrast the per se rule was short-lived in vertical restriction cases. Moreover, the reasoning of the *GTE Sylvainia* opinion gives no hint that the per se rule "long . . . applied to tying arrangements because of 'their pernicious effect on competition and lack of any redeeming virtue'" was no longer to be applied to those cases. *MBNA*, 517 F.Supp. at 1377 (quoting *Northern Pacific Ry. Co.*, 356 U.S. at 5, 78 S.Ct. at 518). Defendant's assertion that *GTE Sylvania* somehow upsets established tying law is therefore clearly without foundation.

Mercedes nevertheless contends that *Hyde* all but forecloses the use of a per se standard in tying cases. The case holds, according to defendant, that a per se standard can be used only if the alleged tying arrangement is shown, through market analysis,

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whether a per se standard applied. These cases are therefore discussed, *infra*, in the "separate products" section.

[7] Justice O'Connor argued forcefully that tie-ins have economic utility. However, she could persuade only three other members of the Court to join her. In her rationale she relied in part on the reasoning of Justice White in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) (*"Fortner I"*). Justice White, however, joined with the *Hyde* majority in upholding the per se rule.

to impose an actual restraint on the ultimate consumer's freedom of choice.

This argument mischaracterizes the holding and reasoning of the case.[8] In fact the court could not have made it clearer: "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable 'per se.'" 104 S.Ct. at 1556. The essential characteristic of such an arrangement, the Court continued, is the seller's power to "force" a purchaser to do what he would not do in a purely competitive market. When it is "probable" that a consumer would be "forced" into the purchase of the tied product because of the seller's "market power" in the tying product market, per se condemnation, which is by definition "condemnation without inquiry into actual market conditions," is warranted with respect to the arrangement. *Id.* at 1558-60. Such market power can be demonstrated, the Court noted, by a showing that the "seller's share of the market is high" or by evidence that he "offers a unique product that competitors are not able to offer . . . ." *Id.* at 1560-61. The alleged tying arrangement at issue in *Hyde* was an exclusive contract between the hospital and a firm of anesthesiologists that provided for all anesthesiological services offered by the hospital to be performed by the firm. *Id.* at 1554-56. Because there was no showing that the hospital had any probable forcing power in the tying product market of hospital services, the per se standard was not applicable in that case. *Id.* at 1561-67.

Hyde thus makes no change in the law concerning the use of a per se standard in tying cases. The three-part test articulated by this court in *MBNA* continues to have validity. *See Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984). There is also no indication in *Hyde* or in any other authority that tying analysis is only relevant when the tie is imposed on the ultimate consumer. The alleged tie-in in *Hyde*

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[8] Defendant's reading of the Court's opinion is based largely on the concurring opinion of Justice O'Connor, which, although MBNA disagrees, clearly is at fundamental variance with the opinion of the Court regarding the continued validity of per se analysis. *See*, 104 S.Ct. at 1569, 1576 (O'Connor, J., concurring).

was imposed on the consumer of hospital services, and was therefore analyzed from that perspective. Nothing in the case suggests that all tying cases must be analyzed from that point of view, and no other cases impose that criterion. In *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.*, 475 F.Supp. 973 (D.Mass.1979), plaintiff automobile dealers contended that a requirement by Toyota that they use Toyota delivery services in order to purchase Toyota passenger cars was an illegal tying arrangement. Agreeing that the dealers were the appropriate consumers from whose perspective the tie should be analyzed, the court concluded that the plaintiffs should be allowed to go to trial on their claim, noting that "dealer freedom of choice is an important value protected by tie-in law." *Id.* at 984. *Accord, Grappone, Inc. v. Subaru of New England, Inc.*, 534 F.Supp. 1282, 1289 (D.N.H.1982); *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F.Supp 824, 835 (N.D.Ga. 1976).

In *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir.1983), Mobil dealers contended that the parent company had, among other things, coerced them into a tying arrangement that required them to purchase other Mobil products in addition to gasoline in order to retain their dealerships. The court viewed the evidence to indicate that "Mobil dealers were used as captive consumers of Mobil products," and were therefore victims of an illegal tying arrangement. *Id.* at 1211.

Finally, in the recent case of *Digidyne*, the court determined that defendant Data General's refusal to license a software system except to purchasers of its "central processing units" was an illegal tie. 734 F.2d at 1338. Data General sold these materials "primarily to original equipment manufacturers ("OEMs") who combine them with application software . . . to create a complete computer system for resale." *Id.* at 1342. The tie was therefore imposed on these OEMs, not on the ultimate consumer of the finished computer product. *Id.* at 1342-44. Thus, defendant's "ultimate consumer" argument is without merit.

Hyde also appears to put to rest any possibility that *Pick* creates an "automobile replacement parts exception" to antitrust tying law. In *MBNA*, this court suggested that "the law of tying has evolved substantially since 1935 and . . . the considerations relied

on by that court are more properly construed as possible arguments for a business justification defense rather than as reasons mitigating against the application of a per se standard." 517 F.Supp. at 1376. As noted above, the *IAP* and *Metrix II* decisions have since appeared to give some new vitality to *Pick*. This is not the case, however. The discussion of *Pick* in *IAP* was dictum unnecessary to the result the court reached.[9] What is more, the court relied for this dictum solely upon *Pick* without any discussion of the lengthy history of tying cases after *Pick*. *Pick* was decided in 1935 and affirmed by the Supreme Court in 1936. Adoption of the per se rule in tying cases did not take place until 1947 when the Supreme Court decided *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20 (1947). Since *International Salt* there have been substantial developments in the law of tying and application of the per se rule. All of this was inexplicably ignored by the *IAP* court.

The *Metrix II* court reconsidered its opinion regarding *Pick* after *Hyde* was decided, and issued *Metrix III*, which succinctly states that "*Jefferson Parish* [*Hyde*] concisely summarizes the state of tie-in law, and leaves no room for the so-called *Pick* 'exception.'" *Id.* at 3. *Pick* clearly has no current application other than shedding light on the business justification defense explained below.

III. Per Se Tying Standard

Given the continued vitality of the per se standard as applied to tying cases, it remains to be determined whether the arrangement at issue in this case is an illegal tie which warrants per se condemnation. As this court noted in *MBNA*, a plaintiff must make three important demonstrations in order to establish a per se illegal tying arrangement:

> "1. Two separate products with the sale of one conditioned on the purchase of the other;
>
> "2. A seller with sufficient economic leverage in the tying market to appreciably restrain competition in the tied product market; and

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[9] *See*, note 1, *supra*.

"3. A tie-in affecting a not insubstantial amount of interstate commerce."

517 F.Supp. at 1378 (citations omitted); *see also Digidyne*, 734 F.2d at 1338. Other cases have suggested an additional requirement: that some "modicum of coercion" be exerted upon the purchaser of the tied product by the seller of the tying product. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1407 (9th Cir.1984); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479 (9th Cir.1983). If the plaintiff establishes the above elements, defendant may defend itself "by an affirmative showing of business justification." *MBNA*, 517 F.Supp. at 1378; *see also Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir.1977) ("*Moore I*").

The development of the coercion aspect is less than clear. In attempting to characterize it, one court suggested that tying law is "a kind of semantic shell game." *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1223 (3d Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976). Some courts have looked at coercion in terms of whether the two products were, in fact, tied together, i.e., whether the purchaser was required to buy the tied product in order to get the tying product. *Id.* at 1224. Other have examined it in terms of market power, concluding that coercion is likely if a seller has a patent, a unique product or a substantial market share. *See Robert's Waikiki*, 732 F.2d at 1407.

Under whatever rubric, coercion is a necessary element of an illegal tying arrangement. From the early days of per se application the rule has been that when a buyer is free to purchase the product separately there is no coercion. *Northern Pacific Ry. Co.*, 356 U.S. at 6 n. 4, 78 S.Ct. at 518 n. 4. This year in *Hyde* the Supreme Court emphasized the need for some coercion holding that the per se rule may only be used "if the existence of forcing is probable." 104 S.Ct. at 1560. However, the Court goes on to evaluate it in terms of market power, saying that "the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." *Id.* at 1561. From all this it is possible to conclude that the likelihood of some coercion must be shown and that

ordinarily if the purchaser must purchase the tied product in order to get the tying product and the seller has market power in the tying product coercion may be presumed. For the reasons explained in subparagraph A.2 and subparagraph B below, plaintiffs have clearly established the "modicum of coercion" necessary to invoke the per se standard. Thus the court finds coercion based on the Dealer Agreement and the fact of its acceptance by a large number of dealers who have stated they believe they had no choice. That evidence, while sufficient to show forcing is likely, is not sufficient to meet the more rigorous requirement of market power sufficient to impose significant restraints on competition in the tied product market.[10]

A. Separate Products Tied Together

1. Two Separate Products

In *MBNA*, defendant contended that the Mercedes-Benz passenger car and its replacement parts were not separate products. In making this argument it relied upon a number of authorities, but principally *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir.1980), *cert. denied*, 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981), which held that McDonald's franchisees could be required to operate only on premises leased to them by the parent company. This was not an illegal tying arrangement, reasoned the court, because "the challenged aggregation is an essential ingredient of the franchised system's formula for success," making the franchise and the premises lease "a single product." *Id.* at 309. MBNA contended that the Mercedes replacement parts arrangement was like the McDonald's lease requirement, since "the purchase of MBNA replacement parts is an 'integral component' of its [MBNA's] franchised business method." *MBNA*, 517 F.Supp. at 1380.

This court rejected that argument, noting that while the McDonald's arrangement was essential to the company's purpose of providing fast food products, the basic purpose of a Mercedes-

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[10] The court in *Moore I* also noted that the seller of the tying product should have an economic interest in the tied product. 550 F.2d at 1216. *MBNA* clearly has an economic interest in the allegedly tied replacement parts. *MBNA*, 517 F.Supp. at 1378 n. 10.

Benz franchise was the distribution of Mercedes-Benz passenger cars, not Mercedes replacement parts. *Id.* at 1380-81. It was held that "[t]here is nothing inherent in the Mercedes-Benz franchise or trademarked automobile that prevents . . . replacement parts from being provided from non-approved sources." *Id.* at 1381. Notwithstanding this reasoning, defendant, citing a number of recent trademark/franchise cases that essentially stand for the same proposition as *Principe*, renews the same contention here. This court must again reject it.

MBNA relies principally on *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir.1982). In that case, ice cream store franchisees contend that "Baskin-Robbins ice cream products are unlawfully tied to the sale of the Baskin-Robbins trademark." *Id.* at 1351. The court rejected this claim. Distinguishing between a "business format" franchise system and a "distribution" franchise structure, it noted that while a "business format franchise is usually created merely to conduct business under a common trade name," with the distributor franchise "the franchised outlets serve as conduits through which the trademarked goods of the franchisor flow to the ultimate consumer." *Id.* at 1353. Since "the Baskin-Robbins trademark merely served to identify the ice cream products distributed by the franchise system," the ice cream and its trademark were not separate products, and tying law therefore had no application to the case. *Id.* at 1354.

None of that is relevant to this case. MBNA vigorously insists that *Krehl* stands for the proposition that "the law of 'tying' has no application at all to exclusive dealing arrangements used by manufacturers in the distribution of products to consumers through retail outlets displaying the manufacturer's trademark" (Def.'s Brief Opp. Summ. Judgment at 27), and that MBNA can therefore require its franchised dealers to sell only genuine or approved Mercedes replacement parts. This reasoning mischaracterizes *Krehl*. The court in that case said tying law did not apply to that particular situation because the purpose of the franchise was to distribute the trademarked ice cream; the trademark and the product it identified were therefore not separate. The purpose of a Mercedes-Benz franchise, as this court previously held, is the sale of Mercedes-Benz automobiles. *MBNA*,

517 F.Supp. at 1381. The Mercedes-Benz passenger car and its trademark are therefore not separate products. That reasoning could not be extended to cover any and all other products a franchisor may wish to distribute through a franchisee, however, without swallowing the whole of antitrust tying principles. Indeed, such a state of affairs would make it possible for MBNA or any other franchisor to require its franchisees to distribute "any product it decided to manufacture," whether or not those products were essential to the purpose of the franchise. *Id.* at 1380. *Krehl* cannot be read to support such a result.[11]

The other cases cited by defendant are likewise unavailing. In *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir. 1982), a Shell service station operator alleged that the requirement that he purchase Shell gasoline in order to obtain a Shell franchise was an illegal tying arrangement. *Id.* at 786. In rejecting the claim, the court merely determined that the Shell trademark and the gasoline the franchise had been established to distribute were not separate products. *Id.* at 787-88.

In *California Glazed Products, Inc. v. Burns & Russell Co.*, 708 F.2d 1423 (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983), a trademark licensee who manufactured finished masonry blocks alleged that an agreement requiring it to purchase from the licensor the trademarked ingredients to finish the blocks was an illegal tie. *Id.* at 1426. The court rejected the claim, holding that since the license existed for the purpose of distributing the trademarked ingredients, those ingredients and its trademark were not separate products. *Id.* at 1427-30.

In *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983), the assignee of the claims of a number of individual pharmacies contended that a

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[11] Defendant makes much of the argument that since a Mercedes franchise is a "distribution" franchise rather than a "business format" franchise, *Krehl* and the other franchise cases apply to this litigation. As has been clearly demonstrated, Mercedes passenger cars and their replacement parts are separate products; these arguments about the format of the franchise aid MBNA not at all with respect to the sales of replacement parts.

health insurance provider's policy of dispensing drug benefits only through its own pharmacy was an illegal tying arrangement. *Id.* at 1284. The court held that this arrangement came within the "business of insurance" exception to antitrust law provided by the McCarran-Ferguson Act, and was therefore not an illegal tie. *Id.* at 1284-87. Plaintiff alleged further, however, that the requirement that subscribers to the health plan exercise their drug benefits only at the provider's pharmacy also constituted an illegal tying arrangement. *Id.* at 1288-89. The court rejected this claim, holding that since the subscriber's "purchase of drugs in the required manner was the consummation of the pharmacy benefit, not an unwanted and unnecessary product tied to the desired product," the pharmacy benefit and the restriction on the use of pharmacy services were one product. *Id.* at 1289-90.

Some comments the *Klamath* court made are relevant to the present action. Referring to the "function of the aggregate" test articulated in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972), the court said that "[s]eparateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. [Citation to *Siegel*, 448 F.2d at 48.] The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand." 701 F.2d at 1289. The Supreme Court has defined the two-product inquiry as whether there is a "sufficient demand" for the purchase of the tied product separate from the tying product "to identify a distinct product market in which it is efficient to offer" the two separately. *Hyde*, 104 S.Ct. at 1563 (citing approvingly this court's earlier decision in *MBNA* as well as *Siegel*). *See also Digidyne*, 734 F.2d at 1339.[12]

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[12] Defendant argues that *Siegel* is an "odd-ball" case that is a singular exception to the rule established in the franchise/trademark cases. *Siegel* cannot be dismissed so easily. The Supreme Court saw fit to treat *Siegel* approvingly in *Hyde* when the Court included it in an enumeration of cases consistent with its two-product analysis. 104 S.Ct. at 1563 n. 35. The tied products in that case were clearly not central to the purpose for which the franchise had been established, and thus were part

It remains undisputed in this action that "MBNA has separate personnel and price lists for new car and replacement part sales," and that "[m]any replacement (as well as original) parts are manufactured by outside suppliers." *MBNA*, 517 F.Supp. at 1380. It is also clear that there is a demand for Mercedes replacement parts separate from the demand for the Mercedes Benz passenger car itself. This court therefore finds, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products.

2. Products Tied Together

No tying arrangement exists, however, unless it is also demonstrated that the purchase of the tying product is conditioned on the purchase of the tied product. In *MBNA*, this court determined that the "express wording of the Dealer Agreement" tied the purchase of Mercedes-Benz passenger cars to the purchase of MBNA-supplied replacement parts. 517 F.Supp. at 1381-84. It so concludes again now.

Defendant previously argued that notwithstanding the language of Paragraph 9C of the Dealer Agreement, the understood practice is that "dealers are free to purchase non-Mercedes-Benz parts and that [this] evidence of the parties' understanding should be controlling." *Id.* at 1381. Defendant repeats that argument here, with the additional contention that two other provisions of the Dealer Agreement, taken together with Paragraph 9C, demonstrates the lack of a tie between the Mercedes-Benz automobile and its replacement parts.

Paragraph 9D of the Dealer Agreement provides:

> Dealer shall not represent as new, genuine MB parts or as parts approved by DBAG any parts used by it in the repair or servicing of MB passenger cars, which are not in fact new, genuine MB parts or parts expressly approved by DBAG or MBNA.

Paragraph 13F of the Agreement provides:[13]

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of an illegal tie-in. The replacement parts at issue in this case are also not central to the purpose of the Mercedes franchise. If other elements are demonstrated, they also may be shown to be part of an illegal tie.

[13] This provision was added to the Agreement in 1983.

> If Dealer sells for use in the repair of any MB Product any parts which are not genuine MB Parts or parts expressly approved by DBAG or MBNA, Dealer will advise the purchaser by appropriate written notice on the Invoice that such parts are not genuine MB Parts supplied by MBNA and are not warranted by MBNA. Dealer will also, by appropriate written notice on the Invoice, advise the purchaser of the source of such parts and of the warranty, if any, given by the supplier of such parts.

According to defendant, since Paragraph 9D provides for disclosure by the dealer of the use or sale of any non-MBNA parts, "[i]f Paragraph 9C compelled exclusive dealing with MBNA, Paragraph 9D would be to no purpose at all." (Def.'s Brief Supp.Summ.Judgment, at 14). Moreover, MBNA continues, the basic, "implicit" purpose of Paragraphs 9C and 9D is to provide for "full and conspicuous disclosure"; Paragraph 13F is the "explicit" declaration of that purpose. *See, id.* And, in any event, continues defendant, 9C is, in practice, irrelevant, since "dealers interpret [it] (as well as the other provisions of the Agreement) in various ways, or they simply ignore it. Some do not know of it; others interpret it as going only to 'safety related' parts; all feel free to overlook it." *Id.* at 15. In sum, contends MBNA, all 9C does is require dealers to "buy some MBNA parts as a condition of the privilege to display the trademark." *Id.*

None of these arguments is sufficient to convince this court to alter its previous determination of this question. Notwithstanding any other provision of the Agreement, Paragraph 9C clearly forbids the use or sale of non-genuine or unapproved replacement parts "if such parts are necessary to the mechanical operation of such MB passenger cars." That has nothing to do with "full and conspicuous disclosure"; it clearly prohibits dealers from using or selling certain equipment.

It is also clear that these three provisions deal with different types of replacement parts. While Paragraph 9C pertains only to parts "necessary to the mechanical operation" of the car, Paragraphs 9D and 13F, which do not contain this limiting language, clearly pertain only to those non-genuine parts that 9C does not prohibit dealers from using. Thus, Paragraph 9C cannot

be read into superfluity or given interpretations its language will not bear, as defendant would wish; if it had no purpose, it would not be in the Agreement.[14]

Defendant's further attempt to scuttle 9C by arguing that the dealers either interpreted it to suit their own purposes or ignored it entirely is also without merit. Even if the dealers did feel free to ignore the provision—and there is substantial evidence to the contrary—the fact of the existence of tying language is enough to evidence a tie. As this court previously noted, such language by itself has considerable "coercive potential," and evidence that it was actually enforced is not necessary to show a tie-in unless "the contract itself does not demonstrate a formal tying agreement." *MBNA*, 517 F.Supp. at 1381-82 and n.17; *see also Northern Pacific Ry. Co., supra*, 356 U.S. at 11-12, 78 S.Ct. at 521-522; *Ungar v. Dunkin' Donuts of America, Inc., supra*, 531 F.2d at 1224. Since Paragraph 9C clearly does contain tying language, the fact that some dealers may have ignored it does not defeat the existence of a tie.

The fact that Paragraph 9C applies only to those parts "necessary to the mechanical operation" of the car also does not defeat the existence of a tie. In *MBNA*, this court noted that this language was ambiguous, rendering it impossible for the dealers to know what parts were covered in the proscription. There was also considerable evidence suggesting that the phrase referred, in practice, to virtually the entire automobile. *Id* at 1382 and nn. 18-19.[15] These factors led the court to conclude that the limiting language did not alter the explicit tying arrangement the provision imposes, and it sees no reason to change that determination now.

It is true that Paragraph 9C permits the use of outside parts if they have been "expressly approved" by DBAG. As this court has

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[14] The fact that MBNA earlier considered and then rejected a less restrictive version of Paragraph 9C indicates that the provision was not intended to be without effect. *See*, "Business Justification" section, *supra*.

[15] MBNA officials still appear to consider parts "necessary to the mechanical operation" of the Mercedes car to include virtually the entire car. *E.g.* (Stoehr Dep. at 249-54, Pl.'s App. II).

noted, the existence of an illegal tie-in may in fact be defeated if an actual "approved source" clause and approval mechanism exist. *Id.* at 1382-83. The court determined, however, that no such procedures were available to Mercedes dealers, and the hint in 9C at some possible approval mechanism was therefore illusory. *Id.* at 1383-84. The court has been given no reason to find otherwise now.

For the foregoing reasons, the court is constrained to conclude, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products tied together by Paragraph 9C of the MBNA Dealer Agreement.[16]

B. Sufficient Economic Power

The second factor in determining the existence of a per se illegal tying arrangement is whether "the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Hyde*, 104 S.Ct. at 1559. The use of a per se standard is, indeed, appropriate only if "the existence of forcing is probable," i.e., there exists a "substantial potential for impact on competition" resulting from the economic power of the seller. *Id.* at 1560. This standard can be met if the plaintiff makes one of the following showings:

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[16] Defendant argues that since plaintiff in its damage study admits that BMW imposed no tying arrangement on its dealers, and BMW has in its dealer agreement a provision similar to Paragraph 9C, plaintiff in effect admits that MBNA is not acting in restraint of trade. (Def.'s Brief Supp.Summ.Judgment, at 4, 12, 13, 23, 24, 37). This argument misconstrues the import of the damage study and plaintiff's use of it.

The damage study deals specifically with impact, something that is not at issue in this proceeding. The study took as an assumption the belief of the former officers of Eurasian Automotive Parts that "[w]hereas MBNA was coercing the Mercedes-Benz dealers to eliminate outside purchases, and insisting that the dealers had agreed not to buy except from MBNA and that they honor their agreement 'or else,' BMW employees were not coercing the BMW dealers." (Pl.'s Brief Opp.Summ.Judgment, at 30-31). The provision in the BMW agreement is thus of no import in analyzing whether MBNA's products are tied together.

1. The seller has a "high" share of the tying product market, *id.*;

2. The tying product is a unique product that the seller's competitors are not able to offer, *id.* at 1560-61;

3. A substantial number of consumers have accepted the tie-in and no factor other than the economic power of the seller explains that acceptance. *MBNA*, 517 F.Supp. at 1384; *see also, Hyde*, 104 S.Ct. at 1561 n. 26 (quoting *Northern Pacific Ry.*, 356 U.S. at 7-8, 78 S.Ct. at 519-520).

Plaintiff bases its argument primarily on the second, or "uniqueness" factor, though it does suggest that the third factor is also met here.[17]

As this court held in *MBNA*, a showing of uniqueness is made by the plaintiff if:

> . . . it can show that the alleged tying product, the Mercedes-Benz automobile, is sufficiently unique to give defendant a competitive advantage in the tying product market. If the tying product is sufficiently desirable to consumers or is a product not easily replicated or commonly available, then the producer of the tying product is likely to have sufficient leverage to restrain the tied product market.

517 F.Supp. at 1385-86 (citations omitted). Some courts have held that this demonstration can be made when a seller has economic power by virtue of a patent or a copyright in the tying product. *See, e.g., United States v. Loew's, Inc.*, 371 U.S. 38, 45-46, 83 S.Ct. 97, 102-103, 9 L.Ed.2d 11 (1962). In *Northern Pacific Ry.*, the Court held that the railroads' vast land holdings gave it a unique bargaining position sufficient to establish the requisite economic power. 356 U.S. at 7-8, 78 S.Ct. at 519-520. Although the ownership of a trademark "is not conclusive of economic power," *MBNA*, 517 F.Supp. at 1386, some courts have

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[17] Plaintiff also attempts to argue that the market dominance test is also met here, since the market for the tying product, the Mercedes-Benz passenger car, consists of the Mercedes dealers. (Pl.'s Reply Brief, at 22-23). This argument misconstrues the nature of the market dominance test. *See, Digidyne*, 734 F.2d at 1336, 1340 (9th Cir.1984).

held that a franchisor's trademark control over a common product confers sufficient economic power to establish a tie. *E.g., Siegel v. Chicken Delight*, 448 F.2d at 49-50.

Mozart contends that such factors as the special advantages a Mercedes dealer enjoys and the alleged technological superiority and immense prestige of the Mercedes-Benz passenger car make this automobile and the opportunity to distribute it so uniquely valuable that its producer has power to "force" the dealers to purchase the tied product, MBNA replacement parts.[18] Defendant contends that none of this is sufficient to demonstrate uniqueness for the purpose of establishing economic power on the part of MBNA. Relying primarily on *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) ("*Fortner II*"), MBNA argues that its product is not unique "in the antitrust sense" because Mozart has not shown that it confers on the manufacturer "something approaching the insulation of a patent or a copyright." (Def.'s Brief Supp.Summ.Judgment, at 40). The proper focus in this inquiry, contends defendant, is not the self-laudatory comments of MBNA officials, or the praises heaped upon the Mercedes-Benz passenger car by satisfied customers or automobile critics, but is rather the capacities of MBNA's competitors. Unless it can be shown that they are somehow prevented from marketing products comparable to those offered by MBNA, continues defendant, Mercedes products are not sufficiently unique to give MBNA economic power over the tying product market. *Id.*

Defendant appears to read *Fortner II* to require a producer to have something approaching a monopoly in the tying product market in order for its product to be unique. MBNA made this argument in the previous action before this court; it was rejected then, *MBNA*, 517 F.Supp. at 1386, and must be again now. *Fortner II* does contain language indicating that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product," 429 U.S. at 620, 97

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[18] Plaintiff bases this argument on portions of the extensive deposition and documentary evidence generated by this litigation, mostly on the deposition testimony of MBNA officials. *See*, (Pl.'s Mem.Supp.Summ.Judgment, at 12-24).

S.Ct. at 867, and that the producer's competitors must be "in some way prevented from offering the distinctive product themselves." *Id.* at 621, 97 S.Ct. at 868 (quoting *Fortner I*, 394 U.S. at 505, 89 S.Ct. at 1259). The Court's opinion made it clear, however, that this reasoning did not impose a monopoly requirement, and that the uniqueness showing could be made "[w]henever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price for the nearest substitute . . . " *Id.* 429 U.S. at 621 n. 14, 97 S.Ct. at 868 n. 14 (quoting Note, *The Logic of Foreclosure: Tie-In Doctrine after Fortner v. U.S. Steel*, 79 Yale L.J. 86, 93-94 (1969)). As the court in *Digidyne* noted:

> The concern is not with the restraint on competition in the tying product but on competition in the market for the tied product. What is required is not monopoly power in the tying product market, but only sufficient power to enable the seller to restrict competition in the tied product. If a seller's product is distinctive, not available from other sources, and sufficiently attractive to some buyers to enable the seller by tying arrangements to foreclose a part of the market for a tied product, the adverse impact on competition in the tied product is not diminished by the fact that other sellers may be selling products similar to the tying product.

734 F.2d at 1345. Thus, the plaintiff in that case was able to demonstrate economic power by showing that defendant's software package, arguably the best available and protected by copyright, was sufficiently unique to allow defendant to "force" purchasers of that product to also purchase other materials. *Id.* at 1340-42. This economic power, based on uniqueness, was further enhanced, in the court's view, by the fact that many of the defendant's customers had become, by virtue of their economic investment, "locked in" to the use of the tying product. *Id.* at 1342-43.

Such a strong showing has not been made by plaintiff in this case. This court previously noted that "the Mercedes-Benz passenger car is one of the world's finest automobiles and that the Mercedes-Benz trademark, a three-pointed star in a circle, is recognized worldwide for its representation of automotive luxury,

performance and technology." *MBNA*, 517 F.Supp. at 1373. Plaintiff's impressive array of evidence reinforces these impressions, but does little else. A prestigious and desirable trademark can be persuasive evidence of economic power, *id.* at 1387, but this court is unwilling to determine, as a matter of law, that the prestige of the Mercedes-Benz trademark, taken together with the evidence of the product's technological, safety and luxury preeminence, bestows on MBNA sufficient economic power to force its dealers to accept an illegal tie-in. All of this evidence should be heard and evaluated by a fact-finder at trial before a conclusive determination regarding uniqueness is made.

Mozart also argues, however, that MBNA's economic power is demonstrated by the fact that no explanation other than defendant's ability to impose a tie-in could account for the acceptance of the burdensome terms of Paragraph 9C by the Mercedes dealers. Plaintiff contends that the dealers continued to purchase replacement parts from MBNA, despite the fact that independent distributors offered equivalent parts for much less, because they feared that their two-year franchise agreements would not be renewed if they did otherwise. (Pl.'s Mem.Supp.Summ.Judgment, at 24-27).

In order to make such a demonstration of economic power, plaintiff must show that a significant number of customers in the market have accepted the tie-in, and that there are no explanations other than MBNA's economic power for that acceptance. *MBNA*, 517 F.Supp. at 1385. Mozart falls slightly short on both of these counts. As in *MBNA*, plaintiff has defined the universe of potential buyers as all Mercedes-Benz dealers, and alleges that since 100% of them accepted the adverse terms, a significant number of customers accepted the tie-in. *See, id.* Again, "there is no identified population against which to compare the 400 Mercedes dealers. Plaintiff might argue that 400 represents an appreciable number of buyers from a total population of import car dealers or of import luxury car dealers. Plaintiff has not attempted such a showing." *Id.*

Plaintiff also has not demonstrated that fear of nonrenewal of franchises is the only possible explanation for the dealers' purchase of parts from MBNA. Indeed, some dealers suggest that

the "spectre of non-renewal" did not haunt them at all, and that they had other reasons for purchasing parts directly from Mercedes.[19]

At least one court has determined that since an automobile manufacturer was able to impose burdensome terms on "a significant number of buyers, *i.e.*, its dealers," the manufacturer had sufficient economic power to impose an illegal tie. *Grappone, Inc. v. Subaru of New England, Inc.*, 534 F.Supp. at 1282, 1290 and n. 21. This finding was made, however, after a trial enabled the fact-finder to fully hear and evaluate the evidence. The same procedure must occur in this case. This court therefore declines to conclude, as a matter of law, that MBNA had sufficient economic power to impose an illegal tying arrangement on its franchised dealers.

The court makes that conclusion even though there is considerable evidence that dealers were coerced into the purchase of replacement parts from MBNA. The evidence plaintiff uses to demonstrate the fact of coercion consists primarily of letters, deposition testimony, and MBNA Visitor Reports, which were filled out by MBNA field representatives after inspection tours of Mercedes-Benz dealerships. This evidence seems to indicate that at least some Mercedes dealers or their parts employees felt coerced into buying only genuine MBNA parts, if only "safety-related" parts. Parts managers talk of being harassed by MBNA parts representatives regarding the purchase of outside replacement parts, and some evidence points to possible sanctions imposed against one dealer for his failure to abide by the company policy regarding outside purchases. Defendant's evidence essentially consists of eleven volumes of deposition testimony from numerous Mercedes dealers from around the country who say they have never felt threatened or coerced into buying replacement parts solely from MBNA. Although there is surely enough evidence here to satisfy the "modicum of coercion" requirement, this court nevertheless declines to decide the issue of economic power on summary judgment.

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[19] *See* (Terian Dep., Def.'s App. IX, at 1313-15).

C. Effect on Interstate Commerce

In the previous action before this court, it was determined, as a matter of law, that a not insubstantial amount of interstate commerce was affected by the alleged tying arrangement. *MBNA*, 517 F.Supp. at 1387-88. The court has been given no reason to change its previous finding, and therefore concludes, for a second time, that a sufficient amount of commerce was involved in this arrangement to satisfy this element of the per se analysis.

The court has thus far concluded that the per se tying standard applies in this case. It has also been determined, as a matter of law, that (1) the Mercedes-Benz passenger car and its replacement parts are separate parts tied together by Paragraph 9C of the Dealer Agreement, and (2) that the tie affects a not insubstantial amount of interstate commerce. The court has also determined that the issue of economic power must be decided at trial.[20]

IV. Business Justification

As this court has noted, a defendant can excuse itself from an otherwise per se illegal tying arrangement if it can demonstrate the existence of a business justification. *Id.* at 1388. The defendant bears the burden of proving that justification. *Id.*

MBNA maintains that the arrangement at issue in this case is necessary to make sure that the customer "will get the real thing" in terms of new cars, service, and repairs, and is essential to protecting the quality of the Mercedes-Benz passenger car and the goodwill of the customer. (Def.'s Brief Supp.Summ.Judgment, at 1-9). Mozart contends that, on the contrary, MBNA is without business justification for the tying arrangement for two reasons: 1) a less restrictive alternative that would maintain the quality of replacement parts is available to Mercedes; and 2) in any event, the quality control argument MBNA makes is without

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[20] Defendant also makes much of the argument that a private plaintiff, as opposed to the government, is somehow required, even in a per se case, to prove the entire case, including damages, in order to prevail on any point, and cannot therefore move for partial summary judgment. This argument is without substance. Relevant authority makes it clear that the per se standard is not different for private and government suits. *E.g.*, *Hyde*, 104 S.Ct. at 1556-61; *Digidyne*, 734 F.2d at 1338, 1339.

merit, since replacement parts of appropriate design and quality are available from other sources. (Pl.'s Mem.Supp.Summ.Judgment, at 27-35).

Plaintiff's first contention is based on the fact that in drafting Paragraph 9C of the Dealer Agreement MBNA first considered, then rejected, the following version:

> Dealer shall not use, sell, or offer to sell parts other than genuine MB parts or parts expressly approved by DBAG or DBNA if such parts are
>
> (a) necessary to the mechanical operation of Mercedes-Benz passenger cars; and
>
> (b) not equivalent in quality and design to genuine MB parts expressly approved by DBAG or DBNA.

Id. at 29 (quoting Armstrong *TLC* Dep.Exh. P-12, at 18-19, Pl.'s App. IV). This version, alleges Mozart, would have addressed MBNA's concerns regarding quality without conferring on Mercedes an "uncontrolled silent veto" with respect to outside parts. *Id.* at 29-30.

Moreover, plaintiff contends, MBNA does not, in any event, have a quality control problem. MBNA purchases 80% of its replacement parts from DBAG; of those parts, one-half are manufactured by DBAG, and one-half are purchased by Daimler-Benz from original equipment manufacturers ("OEMs"), who produce the parts according to DBAG manufacturing and quality control specifications. A selection of the OEM parts are subjected to a "second round" of tests by DBAG, even though they have already been tested by their manufacturer. *MBNA*, 517 F.Supp. at 1389. The remaining 20% of the replacement parts purchased by MBNA come directly from OEMs who "have met DBAG's standards for the quality of their parts and inspection procedures." *Id.* at 1389 n. 32. Mozart, citing deposition and declaration evidence, alleges that "almost all" of the replacement parts sold by Eurasian Automotive Products were manufactured by these OEMs, that Mercedes officials knew this, and that independent distributors even offered parts purchased directly from DBAG parts outlets. (Pl.'s Mem.Supp.Summ.Judgment, at 31-33). Moreover, contends plaintiff, MBNA officials had never heard of accidents caused by defective parts sold by independent distribu-

tors, and had indeed heard of no defective part sold by those distributors. In fact, according to Mozart, Eurasian had a better record with warranty claims than Mercedes, who has needed to have many "recall campaigns." *Id.* at 33-35. In sum, Mozart asserts that MBNA's quality control justification lacks merit because the parts marketed by Eurasian were, in fact, of the same quality as many of those used, and even marketed by DBAG and MBNA.

In response, Mercedes claims that its legitimate business objective "is to wed the customer to [the Mercedes-Benz] brand of automobile" and "to keep the car in first class running order." Citing authority used unsuccessfully in its attempt to remove the case from the purview of the per se standard and place it within the parameters of the franchise/trademark cases, MBNA argues that the business of affording the customer "reliable service and quality replacement parts" is an "inseparable aspect of the business of selling new cars" and "vital to good will and competitiveness." (Def.'s Brief Supp.Summ.Judgment, at 1-6). Since, according to defendant, MBNA has no direct control over the quality and design testing of the OEMs and other manufacturers of replacement parts, and indeed could not have such control, it has no assurance that those parts are of the requisite quality and has a legitimate fear of inferior parts coming from those sources. *Id.* at 7-9 and n. 2. Defendant also calls into question Mozart's characterization of MBNA's warranty record and recall campaigns, *id.* at 42-44, and, pointing to the allegedly faulty brake disc marketed by Eurasian in 1976, contends that some parts sold by OEMs (apparently those not intended for DBAG, but solely for the wholesale market) and other manufacturers of "copy parts" are often inferior, and "sometimes dangerously inferior in quality," to genuine DBAG parts. *Id.* at 7-9, 19-20. MBNA does admit that 20% of its parts purchases are from OEMs whose parts have not gone through DBAG's rigorous "second test," but suggests that these OEMs were superior to others, that they had never forced its dealers to buy such parts, and that MBNA "is now in the process of establishing a quality control program in the United States that will duplicate what is done in Germany." *Id.* at 45.

· MBNA's argument regarding the distinction between the distribution, servicing and repair of passenger cars and the sale of other consumer goods is not without merit. *See, MBNA*, 517 F.Supp. at 1390. Indeed, this court has noted that MBNA "has an important legitimate interest in protecting its trademarked automobile and public confidence in the quality and safety of the product." *Id.*[21] The crucial question is whether the alleged tying arrangement imposed on Mercedes dealers is necessary to protect that interest. The inquiry can only be resolved in defendant's favor if MBNA can demonstrate that its quality control procedures are necessary to protect the passenger car's quality, and show that replacement parts of appropriate quality are unavailable elsewhere. *Id.*

Plaintiff has presented an impressive array of argument and evidence which strongly suggests that defendant will have great difficulty meeting its burden here. Defendant's only substantial response to that showing, beyond asserting that it has a legitimate interest in the quality of its product, is to cite the declaration of DBAG inspection director Albrecht Köster. (Köster Decl., Def.'s App. XII, at 1803-25). Köster alleges that from 1981 to 1983, numerous shipments from OEMs contained defective parts, *id.* at 1815-18, which, according to MBNA, demonstrates the need for DBAG quality control procedures. Köster also asserts that it would be impossible for DBAG to monitor the quality control

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[21] Plaintiff argues that the Magnusson-Moss Warranty, Federal Trade Commission Act of 1974, 15 U.S.C. §§ 2301 *et seq.*, especially § 2302(c), is "clear demonstration of Congressional intent that tying arrangements cannot be justified on the ground of preserving goodwill." (Pl.'s Reply Brief, at 23). It is not at all clear to the court that this statute, which prohibits a warrantor from conditioning the warranty on the use of a certain product, and is specifically aimed at prohibiting "the implementation of tying arrangements by means of warranties" (Pl.'s Mem.Supp.Summ.Judgment, at 49) (quoting *Harmsco, Inc.*, 41 Fed.Reg. 34,368, 34,369 (1976)), destroys MBNA's interests discussed here. It is true, of course, that a tie cannot be imposed by Mercedes unless it demonstrates that such an arrangement is the only way the safety and quality of its product can be assured. If such an arrangement proves necessary, this statute would not prohibit it. *See, id.*, at 48 (quoting House Report of § 2302(c)).

procedures of the numerous OEMs, thereby rendering it impossible to know for sure whether the outside parts are of the requisite quality. *Id.* at 1823-24. As plaintiff points out, Köster's declaration deals with replacement part difficulties which took place after the time period relevant in this litigation, and his conclusions regarding the possibility of receiving quality parts from elsewhere is also subject to question.[22] MBNA also cites the deposition testimony of parts manager Don Williams, who suggests that, although he does not know "for sure," some OEMs whose parts are rejected by MBNA leave those parts in Mercedes boxes and then sell them to the independent parts distributors, who then sell them to dealers in the same boxes. This, continues Williams, makes it difficult to tell, for warranty and disclosure purposes, whether the part is MBNA-approved or not. (Williams Dep., Def.'s App. I, at 77-78). This testimony is admittedly specultative and is therefore of little probative value.

As the foregoing discussion indicates, defendant has not made a sufficient showing of the need for DBAG quality control procedures or of the unavailability of quality parts from outside sources to prevail on its own motion for summary judgment. The court also declines, however, to grant plaintiff's motion for summary judgment on this issue. There are serious questions of fact in dispute on the business justification defense that preclude a grant of summary judgment for either party.

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[22] Köster suggests that it would be economically infeasible to require DBAG to monitor all the OEMs who sell on the open market. *Id.* at 1823-24. This does not mean, however, that there are not other possible means available to insure the quality of the parts used in the Mercedes car. Perhaps some quality control system could be implemented directly at the dealer level. The fact that the requirement of quality control poses some problems does not excuse MBNA from doing it. Additionally, Köster and MBNA both appear to misread the import of *Volkswagenwerk A.G. v. Bundeskartellamt* (the "Federal Cartel Office"), No. KVR 8/80 (September 11, 1981). The German court merely held that under German law, VW could not be required to monitor the quality control processes of the OEMs. (Def.'s App. XIV, at 2123). Again, this does not dispose of the matter, for there could conceivably be other means of insuring the quality of replacement parts coming from OEMs.

If plaintiff is able to establish the requisite economic power to impose an illegal tying arrangement, MBNA will have the opportunity to "demonstrate the necessity for its quality control procedures and the unavailability of comparable mechanically necessary replacement parts from non-MBNA sources." *MBNA*, 517 F.Supp. at 1390.

V. The Conspiracy and Monopoly Claims

In addition to the claim of a per se illegal tying arrangement, Mozart alleges that MBNA also engaged, with its dealers, in a conspiracy to boycott independent distributors, and also attempted to monopolize, through "resale price maintenance," the sale of Mercedes-Benz replacement parts, in violation of 15 U.S.C. §§ 1 and 2. The court does not find it necessary to discuss in detail the parties' arguments regarding these claims. The main focus of argument and dispute has been the tying allegation, and the court need do no more here than state that it declines plaintiff's invitation to grant summary judgment as to the conspiracy claim on its own motion, and also will not grant defendant's motion for summary judgment on both claims. There is sufficient dispute regarding coercion to permit the conspiracy claim to proceed to trial, and neither party has mustered sufficient argument on the monopoly claim to justify summary judgment treatment.

VI. Conclusion

Based on the foregoing discussion, the court determines that since there are genuine issues of fact regarding the points raised in plaintiff's motion for summary judgment, that motion must be DENIED. Because the per se standard is applicable as to the tying count, and sufficient factual dispute remains as to the conspiracy and monopoly counts, defendant's motion for summary judgment is also DENIED.

As permitted by Fed.R.Civ.P. 54(d), the court finds that there is no substantial controversy as to the following facts:

1. The Mercedes-Benz passenger car and its replacement parts are separate products tied together by the terms of Paragraph 9C of the MBNA Dealer Agreement; and

2. The tying arrangement affects a substantial amount of interstate commerce.

This matter will proceed to trial on the illegal tying arrangement claim on the issues of:

1. Whether MBNA has sufficient economic power to restrain competition in the tied product market; and

2. Whether MBNA has a legitimate business justification for the tying arrangement at issue in this case and on the conspiracy and monopoly claims.

3. On the conspiracy and monopoly claims.

IT IS SO ORDERED.

Appendix C

Not for Publication

United States Court of Appeals
for the Ninth Circuit

Nos. 86-1733, 86-2156
DC# CV-81-0531-MHP

The Mozart Company, a corporation,
Plaintiff-Appellant,

v.

Mercedes-Benz of North America, Inc., a corporation,
Defendant-Appellee.

ORDER

[Filed February 26, 1988]

Before: SNEED, ALARCON, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appendix D

Supreme Court of the United States

No. A-840

Mozart Company,
Applicant,

v.

Mercedes-Benz of North America, Inc.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for the applicant,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1988.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 28th day of April, 1988.

Appendix E

In the United States District Court
For the Northern District of California

No. C-81-0531-MHP

The Mozart Company, a corporation,
Plaintiff,

vs.

Mercedes-Benz of North America, Inc., a corporation,
Defendant.

VERDICT OF THE JURY

[Filed Oct. 24, 1985]

1. Do you find that the defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the *per se* test?

Yes ☑ No ☐

2. Do you find that defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the Rule of Reason test?

Yes ☑ No ☐

If you have answered "Yes" to either question 1 or 2 then answer question 3. If you have answered "No" to both questions 1 and 2 stop here and do not answer any other questions.

3. Do you find that there was a business justification for the conduct which you have found violated Section 1?

Yes ☑ No ☐

If you have answered "Yes" to either question 1 or 2 and "No" to question 3 then answer question 4. If you have answered "Yes" to question 3 stop here and do not answer any other questions.

4. Do you find that Eurasian Automotive Products, Inc. was injured in its business or property by reason of a violation of Section 1 of the Sherman Act on the part of Mercedes-Benz of North America, Inc.?

Yes ☐ No ☐

If you have answered "Yes" to question 4 then answer question 5. If you have answered "No" to question 4 stop here and do not answer question 5.

5. What was the dollar amount, if any, of damages sustained by Eurasian Automotive Products, Inc. by reason of defendant's violation of Section 1 of the Sherman Act?

$ ______________

Dated: 10/24/85

/s/ JOEL P. POWERS
Foreperson

Appendix F

STATUTES INVOLVED

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, as amended, Sections 3 and 4, 15 U.S.C. §§ 14 and 15:

Clayton Act, Sec. 3; 15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Clayton Act, Sec. 4; 15 U.S.C. § 15 (*as in effect during the period of this case*):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, Sections 1 and 2, as amended, 15 U.S.C. §§ 1 and 2:

Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is declared to be illegal. . . . "

Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . . "